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### Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement

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# DISSENT AS DIALECTIC: HORIZONTAL AND VERTICAL DISAGREEMENT IN WTO DISPUTE SETTLEMENT

MEREDITH KOLSKY LEWIS\*

*“Legal precedent in international dispute settlement  
is neither to be worshipped nor ignored.”*

Gilbert Guillaume, former President of the International Court of Justice<sup>1</sup>

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<sup>1</sup> Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT’L DISP. SETT. 5, 5 (2011).

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## I. INTRODUCTION

Since the creation of the World Trade Organization (WTO) in 1995, much has been written in praise of the WTO's dispute settlement system. WTO dispute settlement improves upon the system used by the General Agreement on Tariffs and Trade (GATT),<sup>2</sup> which the WTO subsumed. In particular, the WTO has a rule-

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<sup>2</sup> The GATT is a multilateral agreement that entered into force in 1947. It was negotiated in the context of a larger effort to create an International Trade Organization (ITO), which would have constituted the third of the three planned Bretton Woods international economic institutions (in addition to the World Bank and International Monetary Fund). However, the ITO Charter never entered into force, and the GATT was the vehicle pursuant to which trade negotiations were conducted for the following several decades. In 1995, upon the entry into force of the World Trade Organization (WTO),

based structure in contrast to the GATT's more diplomatically oriented processes. The WTO system includes two-tiered dispute settlement, automatic adoption of panel and Appellate Body reports, and remedies in the event a losing party fails to comply with recommendations directed towards it. WTO members have embraced the new dispute settlement system, and have initiated several hundred disputes over the past sixteen years. However, a systemic review of WTO jurisprudence a few years ago<sup>3</sup> revealed a curious fact—that compared with other international tribunals,<sup>4</sup> there had been a decided lack of dissent in WTO dispute settlement proceedings. In a previous article focusing on this phenomenon, I determined that dissent was being actively discouraged, and argued that dissent should no longer be avoided at all costs, but should instead be aired, as it could serve useful functions.<sup>5</sup> More recently, a fascinating drama has played out whereby panels have not only featured dissents amongst the three panelists, but entire panels have disagreed with—in effect “dissented from”—Appellate Body reports. The present piece therefore revisits the issue of dissent in WTO dispute settlement, examining both the legal permissibility and normative desirability of horizontal and vertical disagreement. In so doing, it develops a theory of WTO dispute settlement reports, and disagreement therein, as a form of dialectic, or dialogue.

Part II of this article discusses the utility of dissents in dispute settlement generally. Part III develops a theory of dissent in the WTO context. This latter Part first explains the structure of WTO dispute settlement; second, it notes unique attributes and competencies of WTO dispute settlement panels and the Appellate Body; and third, it postulates purposes of WTO dispute settlement, including its dialectical nature. As such, it suggests that disagreement in WTO dispute settlement should be viewed as a part of a dialectical process, rather than a mere desire to be disagreeable. In Part IV, I apply this theoretical framework to both horizontal and vertical disagreements in WTO dispute settlement, considering dissent or disagreement in each context. In the context of considering horizontal disagreement—dissents *within* dispute settlement panels or Appellate Body divisions—I respond to a recently published critique of my previous article on dissent in WTO dispute settlement.<sup>6</sup> This Part then uses the WTO's jurisprudence in a series of related cases (all dealing with the contentious issue of “zeroing”<sup>7</sup>) to illustrate how dissent can be both horizontal and vertical. In particular, I examine an unusual recent phenomenon whereby WTO dispute settlement panels (the arbiters at first instance) have reached unanimous decisions, but these decisions explicitly disagree with (or, I argue, in effect “dissent” from) previous decisions of the WTO Appellate Body (the tribunal of last instance). This Part concludes by examining the Appellate Body's pronouncements regarding the degree to which panels and the Appellate Body itself should feel compelled to follow precedents. In

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the GATT 1947 text, as amended and with supplementary understandings, was incorporated into the WTO as “GATT 1994”. GATT 1947 is no longer in force.

<sup>3</sup> See Meredith Kolsky Lewis, *The Lack of Dissent in WTO Dispute Settlement*, 9 J. INT'L ECON. L. 895 (2006).

<sup>4</sup> *Id.* at 901–902.

<sup>5</sup> *Id.*

<sup>6</sup> James Flett, *Collective Intelligence and the Possibility of Dissent: Anonymous Individual Opinions in WTO Jurisprudence*, 13 J. INT'L ECON. L. 287 (2010).

<sup>7</sup> “Zeroing” is a methodology used in the calculation of dumping duties. See *infra* Part IV of this article for a more detailed explanation of the concept.

Part V, the article attempts to answer a question left open by the Appellate Body—namely, under what circumstances, if any, should panels be permitted to diverge from previous Appellate Body precedent. I assess this question both through the lens of statutory interpretation and through normative analysis. In Part VI, I apply the normative criteria identified in Part V to the WTO’s “dissenting” panels to assess the appropriateness of their failure to follow the Appellate Body’s decisions. In Part VII, I conclude that raising points of difference can serve useful dialectical purposes in the context of both horizontal and vertical disagreement. In addition, I argue that the Appellate Body has wisely refrained from requiring panels to follow previous Appellate Body rulings.

## II. ARE DISSENTS DESIRABLE OR DISAGREEABLE?

### A. Beneficial Aspects of Dissent

In the domestic common law context, judges and academics have advanced numerous arguments in support of the use of dissent in judicial decisions.<sup>8</sup> First, dissents may lead to better overall opinions. If the majority knows that the minority will, or may, write its own decision, the majority is likely to work harder to reach a clearer, more thoroughly argued opinion that addresses the concerns of the minority.<sup>9</sup> Justice Brennan has applied the “marketplace of ideas” concept to dissent, arguing that the airing of opposing views will lead to better decisions: “the best way to find the truth is to go looking for it in the marketplace of ideas. It is as if the opinions of the Court—both the majority and the dissent—were the product of a judicial town meeting.”<sup>10</sup>

Second, dissents may serve signaling or corrective functions, including: providing litigants and lower courts with a roadmap for how to distinguish the majority’s position; proposing an alternative approach for subsequent jurists to consider; spurring all members of the court to consider potential flaws in the majority’s reasoning; and signaling to the legislature the need to respond to the majority’s approach. In the words of Charles Evans Hughes: “[a] dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”<sup>11</sup>

Third, the possibility of dissents helps observers reach conclusions as to the

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<sup>8</sup> For discussions of judicial dissent generally, see, e.g., CASS SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986); Lani Guinier, *Foreword: Demosprudence Through Dissent*, 22 HARV. L. REV. 4 (2008); Meredith Kolsky, Note, *Justice William Johnson & the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069 (1995); Andrew Lynch, *Dissent: The Rewards & Risks of Judicial Disagreement in the High Court of Australia*, 27 MELB. U.L. REV. 724 (2003); Edward McGlynn Gaffney Jr., *The Importance of Dissent & the Imperative of Judicial Civility*, 28 VA. U.L. REV. 583 (1994); Richard Primus, *Canon, Anti-Canon, & Judicial Dissent*, 48 DUKE L.J. 243 (1998); Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1996); Lewis, *supra* note 3.

<sup>9</sup> See Lewis, *supra* note 3, at 917.

<sup>10</sup> *Id.*, quoting from William J. Brennan, Jr., *In Defense of Dissents*, *supra* note 8, at 430 (1986).

<sup>11</sup> CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928). See also Kolsky, *supra* note 8, at 2083–85.

relative legitimacy of decisions. A decision without dissents (9-0 in the U.S. Supreme Court context, for example) may well seem more commanding and definitive than one with dissent. In addition, the 9-0 ruling would gain additional legitimacy because observers would understand that the adjudicators had the option of dissenting yet elected not to. As such, the unanimous opinion becomes more powerful, and is given a point of differentiation from more contentious cases. In the absence of a right to dissent, these differences would be more difficult to discern.<sup>12</sup>

### B. Criticisms of Dissent

Even the most ardent supporters of dissent tend to agree that dissents should be used sparingly.<sup>13</sup> Too much dissent can undermine the legitimacy of a court in a number of ways. First, it calls into question the enduring power of the judicial body's decisions if it regularly cannot reach consensus. Second, it can damage the collegiality amongst members, potentially causing instability on the bench. As Ruth Bader Ginsburg has explained, "[r]ule of law virtues of consistency, predictability, clarity, and stability may be slighted when a court routinely fails to act as a collegial body."<sup>14</sup> Third, dissent, particularly in a court of last instance, may reduce the influence of a given judicial decision.<sup>15</sup> If dissent is viewed as strong medicine that should only be resorted to in limited circumstances, even in a domestic judicial system with as lengthy a history as that of the United States, what role, if any, should it play in WTO dispute settlement? The WTO is a relatively young institution, with a dispute settlement system that can only be used by WTO members themselves, rather than by private actors. As such, it is necessary to consider the WTO's unique circumstances in evaluating to what degree arguments in favor of and opposed to dissent in the domestic judicial setting can be imported into the WTO context.<sup>16</sup>

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<sup>12</sup> Kolsky, *supra* note 8, at 2085–86.

<sup>13</sup> See discussion and sources cited in Lewis, *supra* note 3, at 919.

<sup>14</sup> Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1191 (1992), *quoted in* Kolsky, *supra* note 8, at 2087–88.

<sup>15</sup> Kolsky, *supra* note 8, at 2088.

<sup>16</sup> These arguments are derived primarily from common law courts and commentators. Traditionally, civil law systems have featured far less dissent than their common law counterparts. While judges are often viewed as serving individual roles in the common law setting, civil law judges may view their primary task of interpreting code provisions as institutional or administrative rather than individual. The civil law judge may therefore be more likely to believe there is a single correct answer and accordingly more invested in reaching consensus with his or her fellow judges. See Lewis, *supra* note 3, at 910. See also Arthur Jacobson, *Publishing Dissent*, 62 WASH & LEE L REV 1607, 1631 (2005) (describing dissent as anathema to the civil law sense of "rightness" deriving from its Catholic Church patron). The WTO dispute settlement system draws from both common law and civil law traditions. Civil law influence is reflected in the focus on the dispute settlement system as an institutional function, with decisions taken by the Dispute Settlement Body as a whole rather than the reports of panels and the Appellate Body being binding of their own accord. The civil law traditions embedded in the WTO dispute settlement system may partially explain the historical enmity towards separate opinions. See Lewis, *supra* note 3, at 910–11.

### III. PARTICULARITIES OF WTO DISPUTE SETTLEMENT

#### A. *WTO Dispute Settlement Structure*

The WTO system has two tiers of dispute settlement. In the first instance, complaints are heard by panels that are constituted on an ad hoc basis. Panels generally comprise three individuals, though the parties can elect to have five panelists hear their dispute.<sup>17</sup> Following the issuance of a panel's report, the parties can opt to appeal. Appeals are heard by a standing Appellate Body of seven individuals who sit in divisions of three.<sup>18</sup> Although any given appeal is only formally heard and decided by a division of three Appellate Body members, in practice all seven members discuss each case in detail.<sup>19</sup>

This system of dispute settlement represents a change from the previous method of resolving disputes under the WTO's precursor, the GATT. In the GATT era, there was only one level of dispute settlement, with no ability to appeal. In addition, panel reports could only be adopted with the consensus of all GATT signatories, meaning that the losing party to a dispute had the ability to block the adoption of the report against it. The ability of the losing party to block the adoption of a report injected a degree of uncertainty in the GATT dispute settlement system, and undoubtedly led to fewer cases being brought than otherwise might have. The WTO reverses the consensus presumption extant in the GATT era. In a significant change of approach, under the WTO, reports are automatically adopted unless there is consensus *not* to adopt. Thus, the prevailing party would need to agree in order for a report not to be adopted. As a result, all reports have been adopted under the WTO system. This shift gave panel reports more significance than under the GATT, as such reports can no longer be disregarded at the loser's option. Furthermore, the WTO introduced new provisions designed to induce compliance with adopted panel and Appellate Body reports. These modifications were only possible because they were adopted in tandem with a system of appellate review—namely the creation of the Appellate Body.

The WTO dispute settlement system is often referred to as being “quasi-judicial” rather than judicial, because the system does not operate completely independently.<sup>20</sup> Although reports of the WTO Appellate Body and dispute settlement panels are looked to as interpretations of the WTO Agreements, under the WTO's structure, formally only the Ministerial Conference and the General Council have the authority to interpret the covered agreements.<sup>21</sup> The Appellate

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<sup>17</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes art. 8.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Dispute Settlement Understanding or DSU].

<sup>18</sup> Appellate Body members are appointed to four-year terms that may be renewed once, for a maximum time served of eight years. *Id.* arts. 17.1-17.2.

<sup>19</sup> James Bacchus, *Table Talk: Around the Table of the Appellate Body of the World Trade Organization*, 35 VAND. J. TRANSNAT'L L. 1021 (2002).

<sup>20</sup> For a characterization of the WTO dispute settlement process as a hybrid system that is not entirely judicial in nature, see, e.g., Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, 38 TEX. INT'L L. J. 469, 470 (2003).

<sup>21</sup> Marrakesh Agreement Establishing the World Trade Organization art. IX.2, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement] (“The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the

Body has indicated that the fact WTO members choose to adopt a given report does not render such report a definitive interpretation of the provisions at issue (because this is the province of the Ministerial Conference and General Council).<sup>22</sup>

Procedurally, the WTO agreement that covers dispute settlement is the Dispute Settlement Understanding, or DSU. The DSU provides for a Dispute Settlement Body (DSB) that “shall have the authority to establish panels, adopt panel and Appellate Body reports.”<sup>23</sup> The General Council regularly (usually monthly) holds sessions in which it sits as the DSB.<sup>24</sup> Thus, it is at DSB meetings that the reports of (un-appealed) dispute settlement panels and the Appellate Body are raised for consideration by the WTO membership. Unless there is consensus *not* to adopt the presented reports, the reports are adopted and then become “part of the GATT *acquis*.”<sup>25</sup>

In the case of both panels<sup>26</sup> and the Appellate Body,<sup>27</sup> the DSU explicitly provides that dissents are permitted, but must be anonymous. While the DSU provisions address the possibility of dissent in neutral language, the Appellate Body Working Procedures make it clear that dissent is to be avoided. “[The Appellate Body and its divisions shall make every effort to take their decisions by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue will be decided by majority vote.”<sup>28</sup>

### *B. Nature of the Panels and the Appellate Body*

WTO dispute settlement panels and the Appellate Body serve functions in many ways similar to those of a court of first instance and a court of last instance respectively, but there are important differences. In a domestic context, the lower courts may have dockets largely filled with unremarkable cases, and only occasionally face a challenging question of law. In contrast, the court of last instance may be seen to have the most expertise as it hears far more difficult cases, and far more frequently, than any lower court. The WTO context is not completely analogous. WTO members by and large do not initiate formal disputes against one

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Multilateral Trade Agreements.”).

<sup>22</sup> Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, WT/DS8/AB/R, at 14–15 (Oct. 4, 1996).

<sup>23</sup> DSU art. 2.1.

<sup>24</sup> The General Council and the Dispute Settlement Body both comprise all WTO members. When the General Council acts as the Dispute Settlement Body, it does so with the leadership of a DSB-specific chairperson. Marrakesh Agreement art. IV.3.

<sup>25</sup> DSU art. 16.4 (“Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.”); *Id.* art. 17.13 (“An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.”). Appealed panel reports are not considered by the DSB until the appeal has been completed. *Id.* art. 16.4.

<sup>26</sup> *Id.* art. 14.3 (“Opinions expressed in the panel report by individual panelists shall be anonymous.”).

<sup>27</sup> *Id.* art. 17.11 (“Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.”).

<sup>28</sup> Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/6 (Aug. 16, 2010), Rule 3.2.



another unless there is a colorable legal claim at issue. With hundreds of disputes now having been resolved by panels, and over 100 panel reports appealed to and decided by the Appellate Body, members can “bargain in the shadow of the law.” Accordingly, fewer and fewer “easy” cases are being brought; presumably disputes with more clear-cut rules violations are being resolved without initiating formal dispute settlement proceedings. In addition to the cases being of significance even at the panel stage, WTO dispute settlement also differs from the domestic court setting in terms of the way in which adjutants are appointed, the types of institutional support panels and the Appellate Body receive, and the inter-relationship between the panels and Appellate Body, notwithstanding the hierarchical nature of the dispute settlement system. These unique aspects of WTO dispute settlement are explored below.

### *1. Selection of Panelists and Appellate Body Members*

Although panels are appointed ad hoc, they are not necessarily ill-equipped to do their job. Panelists are selected in part out of geographic concerns (panelists are almost never nationals of any country involved in the dispute), but also with regard to substantive expertise.<sup>29</sup> As such, there is an attempt to, inter alia, put individuals with trade remedies experience on panels addressing trade remedies issues.<sup>30</sup> Thus panels are formed in part by looking for technocrats who will understand the factual as well as the legal issues.

In contrast, prospective Appellate Body members have to undergo a more political process to get appointed. Candidates are all vetted by the WTO membership, and de facto, the United States and the European Union have veto power over nominated individuals. Nominees to the Appellate Body thus have, at a minimum, extensive meetings with U.S. and E.U. trade officials, in which their suitability for the position is assessed. When a country is considering who to nominate, it will be thinking about who can, in effect, be “confirmed” as well as issues of expertise. Members are, understandably, more concerned about the Appellate Body upholding their interests than about panels. Panels can be reversed, but the Appellate Body is the end of the process. Given the somewhat political nature of the appointments process for Appellate Body members, Appellate Body members may be selected in part for reasons unrelated to their degree of international trade expertise. As such, while Appellate Body members obtain significant experience while serving, not all have extensive relevant expertise at the time of their initial cases. Furthermore, the Appellate Body must address appeals covering all of the different covered agreements, and thus even if a member is an expert in, for example, trade remedies, he or she will still have to hear appeals relating to intellectual property, services, and so on.

### *2. Institutional Support for Dispute Settlement Panels and the Appellate Body*

The expertise differential resulting from having ad hoc panels is further

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<sup>29</sup> DSU arts. 8.1–8.4.

<sup>30</sup> “Trade remedies” refers collectively to antidumping, countervailing duties, and safeguards.

ameliorated by the institutional support panels and the Appellate Body both receive. Rather than being supported by recent law graduate clerks as domestic judges might be, the Appellate Body and the panels have the assistance of a permanent cadre of experienced trade lawyers. The Appellate Body gets assistance from the Appellate Body Secretariat; the panels from either the Rules Division or the Legal Affairs Division, depending on the subject matter of the dispute.<sup>31</sup> While some lawyers only spend a year or two in these divisions, both have lawyers that have spent many years in these positions.

### *3. Different Strengths within the Hierarchy*

Thus, contrary to the relationship between courts at different levels of the hierarchy in a domestic system, WTO panels and the Appellate Body have a more complicated relationship. In a way, panelists can be seen as providing a degree of executive agency-style technocratic expertise as well as serving their judicial function, while the Appellate Body is more of a combination of judicial and political/legislative expertise. Here, by “legislative,” I do not mean “drafting laws,” but rather that the Appellate Body is more tied to popular approval and political considerations (including having the possibility but not the guarantee of reappointment) than are the panels.

Panels and the Appellate Body therefore can be seen as having overlapping, but not identical strengths. Panels may have more technocratic expertise in a given dispute, but the Appellate Body is more cognizant of, and pays more attention to, the importance of maintaining its legitimacy with WTO members.

### *C. WTO Dispute Settlement and Disagreement therein as Dialectic*

In assessing disagreement in WTO dispute settlement, we should have in mind what the purposes are of the reports themselves. The DSU tells us the “dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”<sup>32</sup> However, this cannot be the sole purpose. If security and predictability were the paramount objectives, this could be accomplished by determining that in every case the complainant would succeed. This would lead to perfect predictability, but would not be perceived as fair or desirable. Thus we must look further for purpose. DSU Article 11 requires panels to conduct an objective assessment of the matters before them. This would suggest that each dispute should be given its due, without having been pre-judged, and without biases or prejudices. In other words, panels should approach their task of adjudication in good faith. If panels are to make objective assessments, and the system is to provide security and predictability, marrying these two requires the use of reasoned decisions rather than the issuance of a result without explanation. And

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<sup>31</sup> The Rules Division supports panels hearing trade remedies disputes; the Legal Affairs Division supports panels hearing disputes unrelated to trade remedies. See World Trade Organization, Dispute Settlement System Training Module: Ch. 3, WTO Bodies involved in the dispute settlement process, [http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c3s1p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm).

<sup>32</sup> DSU art. 3.2.

indeed, panels do issue (often lengthy) reports that explain their reasoning in detail.

The Appellate Body conducts its work in a similar fashion, also explaining its reasoning. These processes would further suggest that the intended audience for the reports extends beyond the parties to a given dispute. The panels are speaking not just to the parties, but also to the Appellate Body to explain their reasoning. The Appellate Body in turn is addressing not just the disputants before it, but also providing guidance to future panelists and divisions of the Appellate Body with respect to the logic behind its reasoning. Further, the work of the panels and Appellate Body is ultimately subject to adoption by the entirety of the WTO membership acting as the Dispute Settlement Body, and thus all WTO members are a part of the audience. Lastly, the panels and Appellate Body do not operate in a Geneva vacuum; they are aware that their decisions will be reviewed by government officials and other political figures in capitals around the world, as well as by private interests and NGOs. For all of these reasons, we can view dispute settlement reports as being directed at a range of audiences, and WTO adjudication as a type of dialectical process, whereby “opinions communicate to audiences beyond the immediate parties to the dispute.”<sup>33</sup>

The voicing of disagreement in WTO dispute settlement is also a manifestation of this dialectic.<sup>34</sup> The arguments in favor of dissents identified in Part II, *supra*, are equally applicable in the context of WTO dispute settlement. However, the arguments in opposition are arguably stronger, given the relative youth of the WTO and the possibility for members to withdraw from the institution if they are sufficiently dissatisfied. Frequent disagreement in the form of dissents or panels declining to follow Appellate Body precedent could have destabilizing effects. Members might question the system’s legitimacy if it appeared that consensus were the exception rather than the rule. Disagreement could also hinder the ability of a member to comply with a decision (as there might be more legislative resistance to changing the offending measure if it were seen as a “close call” or “split decision”). Thus for a panelist or Appellate Body member to dissent, or for an entire panel to decide not to follow precedent, there must be a good reason for so doing. Participants in the system are aware of the benefits of consensus, and thus are unlikely to disagree just to be disagreeable. Instead, the dissents and failures to follow precedent thus far largely have been intended to extend a dialogue over proper interpretation. By highlighting points of difference with the majority, or a previous report as a whole, the adjudicators can be seen as trying to advance a discussion over the best systemic approach to the given issue. In this way, disagreement in WTO dispute settlement can be seen as a part of a dialectical process, and it is in this context that it should be evaluated.

#### IV. HORIZONTAL AND VERTICAL DISSENT IN WTO DISPUTE SETTLEMENT

There are several different contexts in which disagreement can be voiced in WTO dispute settlement. Most of these are horizontal, including: a dissent within a

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<sup>33</sup> G. Edward White, *The Integrity of Holmes’ Jurisprudence*, 10 HOFSTRA L. REV. 633, 669 (1982) (identifying constitutional adjudication as a dialectical process).

<sup>34</sup> In this article, “dialectic” is used in the context of the historical root of the word, meaning conversation, or dialogue, rather than the more modern Hegelian concept of thesis and antithesis.

panel; a dissent within a division of the Appellate Body; a panel disagreeing with a previous panel; and a division of the Appellate Body disagreeing with a previous Appellate Body report. However, it is also possible to have vertical disagreement, where a panel declines to follow previous decisions of the Appellate Body. This Part explores both horizontal and vertical forms of disagreement, with emphasis on intra-panel and intra-Appellate Body dissent and on panels' disagreement with the Appellate Body.<sup>35</sup>

#### *A. Revisiting the Question of Dissent Within WTO Dispute Settlement Panels or the Appellate Body*

In my earlier article, I determined that the Appellate Body actively discourages dissent amongst its members, and observed that panels were also likely experiencing some pressure not to express disagreement.<sup>36</sup> I argued that the WTO dispute settlement system has achieved sufficient legitimacy that its standing would not suffer if the occasional panelist or Appellate Body member expressed the disagreement that undoubtedly exists in certain cases. I identified a number of positive purposes that dissents could serve, and demonstrated that the few dissents that had been written at the panel level had had an impact, as reflected by the Appellate Body adopting the reasoning of the dissenters in full, in two of the cases,<sup>37</sup> and in part, in a third case.<sup>38</sup>

In 2010, James Flett, a lawyer on the WTO Team of the European Commission Legal Service, responded to my article, taking issue with my conclusion that more dissents would be a positive development. Flett identified fourteen individual opinions at the panel and Appellate Body level, and concluded that ten of these were "incorrect or unnecessary."<sup>39</sup> He argued that "[i]f the right persons are in the job, and if the dispute settlement system is functioning correctly, flexible minds should be able to find common ground"<sup>40</sup> and that therefore "it is in the long-term interests of the WTO that individual opinions remain exceptional."<sup>41</sup>

Below, I address Flett's arguments that most dissents or separate opinions are unnecessary or wrong and further explore the utility of separate opinions.

#### *1. Necessity of Dissents/Separate Opinions*

I disagree with Flett's contention that separate opinions are unnecessary. It is valuable for the Appellate Body—and for the WTO membership at large—to

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<sup>35</sup> The weight to be given by panels to previous panel reports and the Appellate Body to previous Appellate Body decisions is discussed in IV(C).

<sup>36</sup> Lewis, *supra* note 3.

<sup>37</sup> Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R (Jul. 13, 1998); Appellate Body Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R (Nov. 28, 2002).

<sup>38</sup> Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R (Dec. 11, 2000).

<sup>39</sup> Flett, *supra* note 6, at 290.

<sup>40</sup> *Id.* at 313.

<sup>41</sup> *Id.* at 290.

know whether the panel sees the issue as clear cut or whether it presents interpretive difficulties. To have the parties' views recorded on the record (which Flett argues is a sufficient recording of any disagreement on the issues)<sup>42</sup> is not an adequate substitute because parties are "partisan." Just as courts tend to prefer amicus submissions from neutral entities rather than from allies of the parties, it should be more helpful for the Appellate Body to have the views of the neutral panelists than the views of the governments themselves. The record of these panelists' views is similarly more useful to other delegations than the views of the parties to the dispute. Dissents or separate opinions therefore provide information as to points of disagreement, and this additional information can assist the Appellate Body in deciding the best logic to apply.<sup>43</sup>

Presumably therefore, panel reports provide a framework for the Appellate Body to review. While the Appellate Body will review the legal questions de novo, it is useful to have the panel's work, as at a minimum, a starting point. If the panel reports give information to the Appellate Body, it would seem that one relevant piece of information is whether or not the panel saw the interpretive issues as straightforward ones about which they could all agree. Unanimity thus serves a signaling function, as does dissent. Without dissents or separate opinions, the Appellate Body does not have the benefit of recognizing that a given case was exceptionally difficult to resolve, while another was rather simple. While this may seem hypothetical, the reality is that the dispute settlement system is being faced with increasingly challenging disputes. There are unlikely to be many more cases that are straightforward GATT Article I or GATT Article III violations. There is enough jurisprudence on these issues that such disputes are less and less likely to proceed to the panel formation stage. Thus as disputes become increasingly complicated, it is foreseeable that they will be more challenging to resolve and there may be more disagreement amongst panelists. Rather than hiding this disagreement, it should be expressed so that the Appellate Body and delegations have the benefit of the competing interpretations.

Having all reports be unanimous also dilutes the strength of reports that are truly the unified view of all the panelists. Using U.S. Supreme Court jurisprudence as a reference point, the 9-0 decision in *Brown v. Board of Education*,<sup>44</sup> which found segregated schools to be unconstitutional, would not seem as powerful as it did if the Supreme Court had always issued a single unanimous opinion. But because there is often a justice, or two, or three or four, who writes separately, the instances of 9-0 decisions are seen as particularly definitive.

Thus in an adjudicatory system such as the WTO's, with panels and an Appellate Body, the views expressed in the panel reports can have at least two functions. The first is to inform the parties and the WTO membership more broadly as to the panelists' views on the legal issues. The parties can then weigh whether the logic is persuasive or perhaps subject to challenge. To the extent there is serious disagreement amongst the panelists, revealing that disagreement gives more information to the parties in making the decision whether or not to appeal and on what grounds. A second function of panels is to provide reasoning that the

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<sup>42</sup> *Id.* at 314.

<sup>43</sup> As evidenced by the fact that the Appellate Body has in fact adopted the dissenter's reasoning in a number of cases.

<sup>44</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

Appellate Body can then look to, and weigh along with other proposed interpretations—of the parties, of amici, and of its own members.

## 2. *Correctness of Dissents and Concurrences*

Flett's contention that most of the dissents and concurrences have been incorrect seems to reflect somewhat circular logic. In Flett's chart characterizing the separate opinions as of 2010, in instances where the Appellate Body agreed with a panelist's dissent, Flett has consistently characterized the dissent as correct and necessary; but where the Appellate Body disagreed with a dissenting panelist, he has characterized the dissents as incorrect and unnecessary.<sup>45</sup> I take issue with this characterization for a couple of reasons. First, it seems to me to be circular to say if the Appellate Body disagrees, the dissent must have been wrong, and if it agrees, it must have been correct.<sup>46</sup> This presumes the Appellate Body is always correct about everything, and always applies the best logic possible. It suggests that the Appellate Body does not need to see disagreement amongst panelists because it will reach the right outcome regardless. If this were actually the case, then perhaps panels should be dispensed with altogether.

Of course no one is arguing that panels should be abolished. But equally obviously, the Appellate Body is fallible, and does not always use perfect logic in resolving every issue. Nor do panels. This is in part why having a two-tiered dispute settlement structure makes sense. Hopefully panels get it right, but if they don't, hopefully the Appellate Body will catch their errors most of the time. By virtue of having chosen a two-tiered system, WTO members arguably have already determined that it is not always possible for panelists to reach the correct outcome. This would also suggest that a degree of disagreement is to be expected. It would be odd if panels were always unanimous, but sometimes unanimously right and other times unanimously wrong.

## 3. *Utility of Panels*

What is the point of having panels? It is not just to screen out cases, because most panel decisions are appealed. It would seem that one of the functions is to provide the Appellate Body with tools—in the form of legal reasoning—to make the Appellate Body's own opinions more sound and carefully reasoned. An example of this is the evolution in the Appellate Body's reasoning in the zeroing cases. Its logic has evolved quite substantially since the *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* case [hereinafter *EC—Bed Linen*],<sup>47</sup> and this appears to be as a direct result of the arguments raised by the panels subsequently faced with zeroing-related issues. In

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<sup>45</sup> Flett, *supra* note 6, at 292–300.

<sup>46</sup> While Flett does not argue this explicitly, it is telling that in the fourteen instances examined, he never expresses disagreement with the Appellate Body's approach, resulting in a perfect confluence between arguments the Appellate Body rejected being labeled "incorrect" and/or "unnecessary" and those it accepted being deemed "correct."

<sup>47</sup> Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) [hereinafter *EC—Bed Linen*].

addition, the Appellate Body's reasoning in the *United States—Laws, Regulations and Methodology for Calculating Dumping Margins* ("Zeroing") case [hereinafter *US—Zeroing (EC)*]<sup>48</sup> was viewed by some as not particularly compelling, mainly because it seemed to be relying primarily on its own prior decisions<sup>49</sup> instead of applying the Vienna Convention on the Law of Treaties (VCLT) in interpreting the Antidumping Agreement.<sup>50</sup> Subsequently, the *United States—Measures Relating to Zeroing and Sunset Reviews* panel [hereinafter *US—Zeroing (Japan)*]<sup>51</sup> conducted a more thorough analysis of the issues, applying the VCLT. And thereafter in the appeal of that report, the Appellate Body employed more persuasive reasoning than it had in the *US—Zeroing (EC)* case.<sup>52</sup> Thus the panel's suggestion that there was a better way to conduct the inquiry did lead the Appellate Body to improve its legal analysis. Therefore, even though the Appellate Body did not adopt the result of the panel, I would argue that the panel's disagreeing positions were still of value and were neither wrong nor unnecessary.

The above cases are unusual in that the panels disagreed with previous Appellate Body decisions and thus forced the Appellate Body to squarely address the panels' arguments. More commonly, the Appellate Body will largely agree with the panel. Yet the panel report is still of use to the Appellate Body. It provides the Appellate Body with reasoning for the panel's decision, which the Appellate Body can then weigh and consider alongside competing arguments raised in the appellant's and appellee's submissions, as well as other positions with which they may be presented. The Appellate Body decision will surely be the better for having the panel's logic and reasoning as points of reference, regardless of whether the panel's reasoning is adopted in full, in part, or rejected entirely.

#### 4. *Benefits of Separate Opinions*

In the case of horizontal disagreement, a separate opinion within a panel may ultimately be persuasive to the Appellate Body. This has been borne out in practice. In the appeals of the first six cases in which a panelist dissented or wrote separately, the Appellate Body adopted the full reasoning of the dissenter in two of the cases, and in part in a third. Thus dissents have had a real impact in WTO jurisprudence.<sup>53</sup> It also bears noting that while all of the vertical disagreement and

<sup>48</sup> Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins* ("Zeroing"), WT/DS294/AB/R (Apr. 18, 2006) [hereinafter *US—Zeroing (EC)*].

<sup>49</sup> See, e.g., WorldTradeLaw.net, *Dispute Settlement Commentary: Appellate Body Report, United States—Laws, Regulations and Methodology for Calculating Dumping Margins* ("Zeroing"), at 18, (May 27, 2009), <http://www.worldtradelaw.net>, (describing Appellate Body's reasoning as "somewhat cursory").

<sup>50</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Apr. 15, 1994, 1868 U.N.T.S. 201 [hereinafter ADA].

<sup>51</sup> Panel Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R (Sept. 20, 2006) [hereinafter *US—Zeroing (Japan)*].

<sup>52</sup> The Appellate Body's reasoning in *US—Zeroing (Japan)*, while an improvement, was still identified as lacking by some commentators. See, e.g., Tania Voon, *The End of Zeroing? Reflections Following the WTO Appellate Body's Latest Missive*, 34 LEGAL ISSUES OF ECON. INTEGRATION 211, 225 (2007) (noting that the Appellate Body in Appellate Report, *US—Zeroing (Japan)* conducted little positive analysis, and instead mainly rebutted the panel on the question of whether simple zeroing was inconsistent in new shipper and periodic (administrative) reviews, as such, with ADA art. 2.4, 9.3, 9.5).

<sup>53</sup> For a discussion of these three cases (*EC—Poultry*; *US—Carbon Steel*; and *US—Certain EC*

much of the recent horizontal disagreement in WTO dispute settlement has been in the zeroing context, the cases in which the Appellate Body has adopted the logic of the dissenters have not involved zeroing or the ADA.<sup>54</sup>

Even if horizontal disagreement is expressed by an Appellate Body member—and therefore will not be used as a data point again in that dispute—it can still have value. Flett identifies the concurring opinion in the Appellate Body’s *United States—Continued Existence and Application of Zeroing Methodology* report [hereinafter *US—Continued Zeroing*]<sup>55</sup> as “correct, but unnecessary.”<sup>56</sup> However, in my view the concurrence served a very important function. It was presumably written by David Unterhalter, who sat on one of the panels that found zeroing permissible prior to his being appointed to the Appellate Body.<sup>57</sup> This case followed several others in which panels had taken a different approach to zeroing (finding it permissible) than the Appellate Body. The panel in this case had expressed sympathy with the “dissenting panels” but had decided to follow precedent for systemic reasons. In the concurrence, the Appellate Body member says, essentially, that the two camps on zeroing will not agree with one another but it is time to go with the Appellate Body and its precedents for the sake of the system.<sup>58</sup> I suspect this will serve a better signal to future panelists that they should not re-fight the zeroing issue than if there had not been that separate statement. Indeed, since that Appellate Body report was circulated, no panel or panelist has argued that a form of zeroing is permissible. And the United States has not substantively litigated the more recent zeroing cases brought against it; instead, it has acknowledged that the cases are raising the same legal issues already decided in earlier cases, and has not attempted to argue the merits.<sup>59</sup>

Flett’s view also suggests that panelists who dissent should not do so unless they are “correct”—meaning the Appellate Body will agree with them on appeal. But no panelist can know such a thing with any certainty. Indeed, sometimes panelists agree with one another, and the Appellate Body still disagrees and reverses the panel. Yet presumably Flett has no quarrel with those panelists—even though they all “got it wrong.” In his article, Flett suggests that high-quality panelists should be able to reach consensus as to the right answer.<sup>60</sup> While it is of course important to have good panelists, I do not think that panels that are overturned, or panelists that dissent, are low-quality panels or panelists. As an

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*Products*), see Lewis, *supra* note 3, at 928–29.

<sup>54</sup> These cases involved the Agreement on Agriculture (*EC—Poultry*); the Subsidies and Countervailing Measures Agreement (*US—Carbon Steel*); and GATT provisions (*US—Certain EC Products*).

<sup>55</sup> Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (Feb. 4, 2009) [hereinafter *US—Continued Zeroing*].

<sup>56</sup> Flett, *supra* note 6, at 299.

<sup>57</sup> The three members of the Appellate Body that form a given division are identified in the Appellate Body reports. However, pursuant to DSU art. 17.11, “opinions expressed in the Appellate Body report by individuals on the Appellate Body shall be anonymous.” DSU art. 14.3 provides similarly for panels that “[o]pinions expressed in the panel report by individual panelists shall be anonymous.” In the *US—Continued Zeroing* appeal, the members of the division were David Unterhalter, Luis Olavo Baptista, and Yuejiao Zhang (presiding).

<sup>58</sup> *US—Continued Zeroing*, *supra* note 55, at 119–21 (concurring opinion).

<sup>59</sup> See, e.g. Panel Report, *United States—Use of Zeroing in Anti-Dumping Measures Involving Products from Korea*, ¶ 3.2, WT/DS402/R (Jan. 18, 2011).

<sup>60</sup> Flett, *supra* note 6, at 313.



example, the *Brazil—Measures Affecting Imports of Retreaded Tyres* panel<sup>61</sup> comprised a remarkable collection of academic and professional expertise—Chang-fa Lo, Mitsuo Matsushita, and Don McRae. These experts concluded that it did not constitute arbitrary or unjustifiable discrimination under the GATT Article XX chapeau for Brazil to have excluded MERCOSUR countries from its ban on imports of retreaded tyres. The panel found that although Brazil had excluded MERCOSUR countries from its ban, it had done so in order to comply with a ruling of the MERCOSUR dispute settlement tribunal, and further that the quantity of tyres coming from MERCOSUR countries was insignificant.<sup>62</sup> However, the Appellate Body disagreed that Brazil's reasons excused the exclusion of the MERCOSUR countries, and found the measure was arbitrary and unjustifiable.<sup>63</sup> Does that make Matsushita, Lo and McRae bad or low-quality panelists? Did they not try hard enough? I don't think so.

As cases become increasingly complex, disagreements may result, even amongst intelligent, diligent, experts in the field. In the zeroing disputes, in which four panels have found some form of zeroing permissible while the Appellate Body has steadfastly refused to find any form of zeroing allowable, many if not most of the panelists had significant expertise in trade remedies, either as academics, government officials, or both.<sup>64</sup> There simply is not always going to be one answer on which the panel and the Appellate Body will agree. And a panel can act in good faith and comprise excellent people, and even reach a consensus, but may still reach a result with which the Appellate Body disagrees. If this is the case with unanimous panels—and it is—why should it trouble us when a member of a panel reaches a different view? For it may be then that the Appellate Body sides with the position taken by one out of three panelists rather than zero out of three panelists. I do not see this as a problem.

With respect to disagreement within the Appellate Body, the sentiments of recently retired U.S. Supreme Court Justice John Paul Stevens provide food for thought. Stevens wrote the introduction for a 2001 book concerning a scandal in which justices on the Illinois Supreme Court had been caught taking bribes. One of the Illinois justices had considered writing a dissenting opinion that would have revealed the corruption but ultimately did not. In reflecting upon these events

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<sup>61</sup> Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 1.6, WT/DS332/R (June 12, 2007).

<sup>62</sup> *Id.* at paras. 7.271–7.289. The panel did find a different aspect of Brazil's measure—the importation of used tyres through the use of court injunctions—constituted arbitrary and unjustifiable discrimination: *Id.* at ¶ 7.306.

<sup>63</sup> Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶¶ 225–233, WT/DS332/AB/R (Dec. 3, 2007).

<sup>64</sup> Examples include eminent professor and international trade expert William Davey, current Appellate Body member David Unterhalter, and Bruce Cullen, who until recently was New Zealand's senior representative on the rules committee responsible for a large part of New Zealand's domestic trade remedies investigations. Because the United States has been the primary respondent in the zeroing cases, some have characterized these disputes as simply a case of the United States refusing to fall into line with international practice. While it is true that the United States has continued to defend zeroing at least in some contexts, it bears noting that there was only one American (Bill Davey) amongst the twelve panelists who sat on the four panels that upheld some form of zeroing. Further, the first WTO zeroing case *EC—Bed Linen*, was brought against the European Communities. Thus while the United States may be one of the last users and defenders of zeroing, it is not accurate to portray the practice as having always been a solely American phenomenon, and one which only Americans believe is consistent with the ADA.

Stevens said: “[i]f there is disagreement within an Appellate Court about how a case should be resolved, I firmly believe that the law will be best served by an open disclosure of that fact, not only to the litigants and their lawyers, but to the public as well.”<sup>65</sup> This is not only eloquent, but to my mind, correct—and not just for appellate courts, but for panels of first instance as well.

Dissents by members of the Appellate Body may not have a significant impact on the parties themselves, or even perhaps on other WTO members. However, while there is no higher tribunal to attempt to convince with such a dissent, the dissenting Appellate Body member’s words may attract attention from a broader, external audience. Academics that follow the WTO, government policymakers and officials, NGOs, and others in civil society may pick up on the dissenter’s point of view and respond to it in various ways. As such, dissents, particularly by Appellate Body members, can be seen as appealing to an external as well as an internal audience, and as facilitating a broader participation in the dialogue.<sup>66</sup>

When I conducted the research for my original article, there had been very few separate opinions or dissents at either the panel or Appellate Body level of WTO dispute settlement.<sup>67</sup> In addition, the writings of former members of the Appellate Body suggested that members worked exceptionally hard to achieve consensus. Indeed, the impression I came away with was that writing separately, while technically allowed, was being discouraged.<sup>68</sup> In the article, I argued that there might be good reasons at the inception of a new dispute settlement system to discourage dissent because unanimity would help cement the legitimacy of the new mechanism, while dissent might undermine it.<sup>69</sup> However, I went on to argue that after (at that time) ten years of existence, the WTO dispute settlement system was no longer in any serious jeopardy of being undermined as a result of a few shows of disagreement amongst panelists. I therefore said that while writing separately should not be done lightly, it should no longer be affirmatively discouraged.<sup>70</sup> Fast forward to the present, and there have now been several more dissents and separate opinions than there were in 2006. I am therefore less concerned now that panelists are being pressured not to write separately. I do still believe, however, that writing separately should not be discouraged. To be sure, panelists should try to reach agreement, and often will be able to do so. However, when there is a genuine disagreement over treaty interpretation, sometimes compromise may not be feasible. In such instances, when there are strongly held views that result in different interpretations of the treaty, the minority viewpoint should be expressed. This gives the parties and the Appellate Body more information to consider in determining which the better approach is, and should lead to better reasoned

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<sup>65</sup> KENNETH A. MANASTER, *ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS*, Foreword (2001).

<sup>66</sup> Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 21–23 (2008) (discussing Supreme Court Justices’ use of certain dissents to further a dialogue with academics and others knowledgeable about the substantive issues, democratizing the process of considering important legal matters).

<sup>67</sup> As of 2006, separate opinions had been written in less than six percent of panel reports and less than two percent of Appellate Body reports. See Lewis, *supra* note 3, at 899–900.

<sup>68</sup> *Id.* at 903–04.

<sup>69</sup> *Id.* at 904–05.

<sup>70</sup> *Id.* at 930–31.

Appellate Body reports. I do not see any harm in airing these differing viewpoints, and indeed I think it is important to do so in the rare cases when agreement cannot be reached. In this way, the disagreement can serve a useful function as dialectic, rather than being suppressed.

### *B. The Zeroing Cases as Horizontal and Vertical Disagreement*

For the reasons stated above, I disagree with Flett's premises and stand by my initial views with respect to horizontal dissent in WTO dispute settlement. However, recent developments reveal new and challenging issues that also must be considered. First, while the overall number of dissents is still low, it is noteworthy that most of these separate opinions have been issued in cases involving issues relating to zeroing. Significant as these dissents are, they do not reflect the true level of disagreement over zeroing. Before examining the data, a brief explanation of zeroing is in order.

#### *1. What is Zeroing, and Why is it so Controversial?*

The practice of "zeroing" has engendered a substantial amount of controversy in WTO dispute settlement. There has been far more disagreement—both horizontally and vertically—over issues relating to zeroing than any other. While analyzing—or even identifying in detail—the competing interpretations presented in the relevant panel and Appellate Body reports is beyond the scope of this article,<sup>71</sup> a brief introduction to what zeroing is and why issues relating to zeroing have caused so much controversy may be useful.

In an antidumping investigation, a domestic agency (in the case of the United States, this is the Department of Commerce) determines whether dumping has occurred by comparing prices in the importing country with the "normal value" of the like product. Normal value will often be prices for the product in the home market. If the product is being sold in the importing country for less than it is sold for in the originating market, it is deemed to be dumped and duties may be imposed on future imports of the product. Zeroing is a methodology used in calculating dumping margins. When zeroing is *not* used, sales that are made at higher prices in the importing market than in the home market are assigned a negative dumping margin and can offset any unprofitable sales assigned a positive margin. However, when zeroing *is* used, sales made at higher prices than in the home market are simply treated as not dumped, and given a zero dumping margin. Thus when zeroing is used, profitable sales cannot be used to offset unprofitable sales, with the result that zeroing generally results in higher dumping margins. The ADA contemplates three potential ways to compare prices in the importing country with normal value:

[T]he existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export

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<sup>71</sup> Such an analysis is however the subject of an ongoing project.

transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions [under certain elaborated circumstances] . . . .<sup>72</sup>

Thus it is possible to employ zeroing in each of these three methodologies: weighted average to weighted average comparisons (WA-WA), transaction to transaction comparisons (T-T), and weighted average to transaction comparisons (WA-T). Furthermore, antidumping cases have numerous phases, including: the original investigation; annual reviews of those already found to have been dumping; sunset reviews when the agency is determining whether to terminate an antidumping order; and new shipper reviews for exporters not investigated in the original investigation. It is possible to employ zeroing in each of these phases as well. There are thus many different contexts in which it is possible to use zeroing. The Appellate Body has taken an incremental approach to zeroing, evaluating the applications of the methodology as challenged, but declining to make a sweeping pronouncement that zeroing could never be permitted. As a result, there have been a large number of challenges to different uses of zeroing in a variety of contexts.

Zeroing is deeply unpopular internationally because, as mentioned, it generally leads to the imposition of higher antidumping duty rates. However, there has been serious disagreement over the extent to which the WTO ADA prohibits the use of zeroing.

## *2. Degrees of Disagreement over Zeroing*

This section will illustrate the degree of disagreement over zeroing, and the horizontal and vertical forms which that disagreement has taken. Table One illustrates the voting patterns in the six most substantive zeroing cases, reflecting that out of the six panels, two featured dissents, meaning that two out of eighteen panelists wrote dissenting opinions.

**Table One**

Zeroing Panel	# of Panelists in the Majority	# of Panelists in the Minority (= dissents)
EC—Bed Linen	3	0
Softwood Lumber V	2	1
US—Zeroing (EC)	2	1
Softwood Lumber V (21.5)	3	0
US—Zeroing (Japan)	3	0
US—Stainless Steel (Mexico)	3	0
<b>Total</b>	<b>16</b>	<b>2</b>

<sup>72</sup> ADA art. 2.4.2.

However, if we instead look at the substance of the panel reports, the data, set forth in Tables Two and Three, looks quite different. In 2001, in the *EC—Bed Linen* case, the panel and Appellate Body both found zeroing impermissible. That case only considered the context of zeroing as applied in comparisons of weighted averages of transactions with other weighted averages of transactions (WA-WA), and did not opine with respect to the permissibility of zeroing in the context of other types of comparisons. However, one could have reasonably taken the view that, having found zeroing impermissible in the WA-WA context, the Appellate Body was likely to find it impermissible in other contexts as well. Nonetheless, in the five panels that came after the *EC—Bed Linen* case was decided, every panel had at least one member finding a form of zeroing permissible. Four of the five panels had a majority of members permitting zeroing, and three of the panels were unanimous that zeroing was permissible, at least in some contexts. While subsequent panels have largely followed the Appellate Body's decision with respect to zeroing in the WA-WA context, they have been nearly unanimous in their view that zeroing is otherwise permissible. Furthermore, the Appellate Body reversed each of the four panels that found zeroing permissible. Thus when the later panels reached their decisions, they already knew the Appellate Body had rejected zeroing in very similar contexts.

**Table Two**

Zeroing Panel	# of Panelists finding any form of zeroing permitted	# of Panelists finding all zeroing at issue prohibited
EC—Bed Linen	0	3
Softwood Lumber V	1	2
US—Zeroing (EC)	2	1
Softwood Lumber V (21.5)	3	0
US—Zeroing (Japan)	3	0
US—Stainless Steel (Mexico)	3	0
<b>Total</b>	<b>12</b>	<b>6</b>

Finding zeroing permitted in any context after the *EC—Bed Linen* report can be seen as vertical disagreement with, or dissent from, previous Appellate Body decisions.

Table Three

Zeroing Panel	Zeroing in WA-WA comparisons permitted?	Zeroing in WA-T or T-T contexts permitted?
EC—Bed Linen	3-0 no	n/a
Softwood Lumber V	2-1 no	n/a
US—Zeroing (EC)	3-0 no	2-1 yes
Softwood Lumber V (21.5)	n/a	3-0 yes
US—Zeroing (Japan)	3-0 no	3-0 yes
US—Stainless Steel (Mexico)	3-0 no	3-0 yes
<b>Total</b>	<b>14 no, 1 yes</b>	<b>11 yes, 1 no</b>

Finding zeroing permitted in any context after the *EC—Bed Linen* report can be seen as vertical disagreement with, or dissent from, previous Appellate Body decisions.

Therefore looking at panelists writing separately no longer tells the full story. We must look to the substance of the reports in order to recognize that even in cases with unanimous decisions—where no dissents would have been added to Flett's statistics—there has in fact been disagreement.<sup>73</sup> Yet because the disagreement has been with the Appellate Body and not within the panels, and due to the fact that the panels themselves have been united in their views, such decisions are unlikely to be counted as dissents.<sup>74</sup> However, there is little difference between the dissent in the *United States—Final Dumping Determination on Softwood Lumber from Canada* panel report [hereinafter *Softwood Lumber V*],<sup>75</sup> and the unanimous panel decision in *US—Zeroing (Japan)*. In both instances, views

<sup>73</sup> If we look at the panel reports in *United States—Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, ¶ 5.11–5.14, WT/DS264/RW (Apr. 3, 2006), (panel: Ali, Welge, Makuc) [hereinafter *Softwood Lumber V (21.5)*]; *US—Zeroing (Japan)*, *supra* note 51, ¶ 1.6 (panel: Unterhalter, Farbenbloom and Buencamino); and *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 1.6, WT/DS344/R (Dec. 20, 2007) [hereinafter *US—Stainless Steel (Mexico)*] (panel: Cullen, Dumont, Blumberg), we see that all three panels were unanimous, so there were no separate opinions or dissents. But all nine panelists found that certain forms of zeroing were permissible. In addition, in *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, ¶ 1.6, WT/DS294/R (Oct. 31, 2005) [hereinafter Panel Report, *US—Zeroing (EC)*], the members of the panel had found two to one that zeroing was permissible (Davey, Falconer, Beseler). In the case of the *US—Zeroing (Japan)* and *US—Stainless Steel (Mexico)* disputes, the panel reports came out after the Appellate Body's report in *US—Zeroing (EC)* and were thus directly contrary to a prior Appellate Body decision. Flett measures these cases as resulting in the one dissent and one concurrence from *US—Zeroing (EC)*. But in reality, in these four cases, eleven panelists found forms of zeroing permissible while only one panelist found that it was not. So in terms of reaching a consensus, the panelists did reach a consensus. But the Appellate Body disagreed with that commonly held view.

<sup>74</sup> This phenomenon has, in the WTO context, only occurred (to the best of my knowledge) in the zeroing cases. Although there have been other isolated incidents of panels failing to conform to previous Appellate Body practice, this has appeared to be more a matter of carelessness rather than deliberate disagreement.

<sup>75</sup> Panel Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, ¶¶ 9.1–9.24, WT/DS264/R (Apr. 13, 2004) [hereinafter *Softwood Lumber V*].

are being expressed that diverge from that of the Appellate Body with respect to the permissibility of some aspect of zeroing. And it is for this reason that in this article I term these panels “dissenting panels” and discuss their actions alongside a consideration of the practice of dissent within panels. Dissenting panels present an issue of more systemic importance than whether panels reach a unanimous outcome or not, particularly in the case of the *US—Zeroing (Japan)* panel and the *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico* panel [hereinafter *US—Stainless Steel (Mexico)*], which reached their decisions explicitly disagreeing with previous Appellate Body precedent. It should not be of great concern whether panelists disagree with each other from time to time. But when panels disagree with the Appellate Body, they are disagreeing vertically, and this presents a more nuanced issue.

### C. “Dissenting Panels”—Disagreement Between Panels and the Appellate Body

One might argue that panels that dissent really present an issue of precedent, not dissents, and might further comment that unanimous decisions should not be called dissents. With respect to the first potential objection, to be sure, this phenomenon raises issues of precedent. And with respect to the second, it is of course the case that “dissent” generally refers to the minority opinion or opinions within a single judgment. However, in the line of WTO cases addressing the issue of zeroing, several panels have included panelists who have disagreed with the Appellate Body’s reasoning on the legal question at issue. In one of these cases, only one panelist out of three held this view, and thus was truly a dissenter.<sup>76</sup> In another case, two panelists determined the zeroing at issue should be permitted.<sup>77</sup> They were therefore in the majority, yet were disagreeing with previous Appellate Body jurisprudence. And then in the following three cases, all the panelists found zeroing permitted,<sup>78</sup> notwithstanding Appellate Body precedents to the contrary. The panelists arguing that zeroing is permissible were sometimes in the majority and sometimes in the minority within their respective panels, but each was always disagreeing with the Appellate Body. I therefore see the panels that did so in unison as uniformly dissenting—just dissenting against the Appellate Body, not their colleagues. Of course, I acknowledge that formally these panels were unanimous as they did not have any internal disagreement; however, for purposes of this article, I shall refer to them as the “dissenting panels.” While the “dissenting panels” require considerations of precedent not implicated by the “normal” dissents occurring within panels, all of these cases involve a level of disagreement panelists have articulated with respect to the Appellate Body’s zeroing jurisprudence. It therefore seems appropriate to consider the phenomena of disagreement within panels and of disagreement between panels and the Appellate Body as all part of one picture.

This article does not seek to evaluate the substantive differences between

<sup>76</sup> *Softwood Lumber V*, *supra* note 75, ¶ 9.1.

<sup>77</sup> Panel Report, *US—Zeroing (EC)*, *supra* note 73, ¶ 9.14.

<sup>78</sup> *Softwood Lumber V* (21.5), *supra* note 73; *US—Zeroing (Japan)*, *supra* note 51, ¶ 7.259; *US—Stainless Steel (Mexico)*, *supra* note 73, ¶ 7.148.

the panels and Appellate Body,<sup>79</sup> but rather to examine the phenomenon of this unusual type of disagreement. This section reviews the jurisprudence regarding the weight to be given to previous decisions of the system's past and present adjudicators, including the views of one of the dissenting panels and the Appellate Body's response. As a general matter under international law, the decisions and rulings of dispute settlement tribunals do not have stare decisis effect.<sup>80</sup> Similarly, there is no stare decisis in WTO dispute settlement. Dispute settlement reports of panels and the Appellate Body, if adopted, bind the parties to the dispute at hand, but do not bind other WTO members more broadly. However, just because reports are not binding on those not party to the dispute does not mean those decisions do not have precedential impact. To the contrary, panels and the Appellate Body routinely reference and apply previous reports.<sup>81</sup> Thus there is no de jure system of precedent, but de facto, previous decisions are generally followed.<sup>82</sup>

In the WTO context, there are several types of decisions which could be relied upon by later WTO panels or the Appellate Body. These are: i) unadopted GATT panel reports; ii) adopted GATT panel reports; iii) adopted WTO panel reports, and iv) adopted reports of the WTO Appellate Body. Each of these will be considered briefly below.<sup>83</sup>

### 1. Unadopted GATT Panel Reports

Under the GATT, there was a single level of dispute settlement, in the form of ad hoc panels. Pursuant to GATT rules, panel reports would only have a binding

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<sup>79</sup> For a critique of the Appellate Body's earlier zeroing jurisprudence, see Roger P. Alford, *Reflections on US—Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNAT'L L. 196 (2006).

<sup>80</sup> See, e.g., Statute of the International Court of Justice, art. 59, June 26, 1945, 59 Stat. 1055, TS No. 993 at 25, 3 Bevans 1153, 1179 ("The decision of the Court has no binding force except between the parties and in respect of that particular case."); Olav A. Haazen, *Precedent in the World Court*, 38 HARV. INT'L L.J. 587, 588 (1997) (rule of stare decisis does not apply to the International Court of Justice); JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 83 (1998).

<sup>81</sup> JOHN H. JACKSON, *SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* 173, 173–177 (2006). For an extensive discussion of the WTO and precedent, see Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLA. ST. J. TRANSNAT'L L. & POL'Y 1 (1999); Raj Bhala, *The Power of the Past: Towards de Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873 (2001). Disregarding precedent is unusual, but not unheard of, even in systems where precedents have stare decisis effect. Recently Loudoun County, Virginia District Court Judge Dean Worcester announced in an immigration proceeding that he would not follow a January 2011 ruling of the Virginia Supreme Court. The Supreme Court had ruled that judges could not revisit certain immigrant convictions. Judge Worcester indicated that following the Supreme Court's ruling would lead to a constitutional violation going unremedied. See Tom Jackman, *Loudoun Judge Defies Va. Supreme Court, Continues to Reopen Immigrants' Cases*, WASH. POST (Feb. 6, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/06/AR2011020603133.html>.

<sup>82</sup> JACKSON, *supra* note 80, at 83 (noting that "there clearly is a de facto precedential effect operating, albeit not strictly.").

<sup>83</sup> See, e.g., WTO Appellate Body Repertory of Reports and Awards, Status of Panel and Appellate Body Reports, S.8.1–2, available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/reptory\\_e/s8\\_e.htm#S.8.1](http://www.wto.org/english/tratop_e/dispu_e/reptory_e/s8_e.htm#S.8.1) (collection of more detailed excerpts from the relevant cases and authorities discussing applicability of previous GATT precedent. This site has not been updated to reflect the relevant developments from the past few years; these later cases are discussed in detail in this article.).



effect on the parties to the dispute if *all* GATT members agreed to the adoption of the report. Because any one member could block the adoption of a report, the losing party to a dispute sometimes did exactly this, resulting in a number of unadopted panel reports.<sup>84</sup>

In an early WTO appeal, the WTO Appellate Body had the occasion to consider what weight, if any, to give to unadopted GATT panel reports. It stated: “we agree with the Panel’s conclusion . . . that unadopted panel reports ‘have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members.’ Likewise, we agree that ‘a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant.’”<sup>85</sup>

## 2. *Adopted GATT Panel Reports*

In *Japan—Taxes on Alcoholic Beverages* [hereinafter *Japan—Alcohol*], the Appellate Body made clear that adopted GATT panel reports are to be taken into account by WTO panels and the Appellate Body:

Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*.<sup>86</sup>

## 3. *Adopted WTO Panel Reports*

In the *Japan—Alcohol* case cited above, the Appellate Body further clarified that both adopted GATT and WTO panel reports should be treated as a

<sup>84</sup> See, e.g., Report of the Panel, GATT Dispute Panel Report on *United States—Restrictions on Imports of Tuna*, Aug. 16, 1991, 30 ILM 1594, 1620 (1991); Report of the Panel, *United States—Procurement of a Sonar Mapping System*, GPR.DS1/R (Apr. 23, 1992); Report of the Panel, *United States—Restrictions on Imports of Tuna*, (unadopted panel report, June 16, 1994), 33 I.L.M. 839, 899 (1994); Report of the Panel, *European Communities—Import Regime for Bananas*, DS38/R (unadopted panel report, Feb. 11, 1994). The ability for a party to block adoption of a panel report that went against it was seen as a significant flaw in the GATT dispute settlement system. There was a significant increase in unadopted reports in the final years of the GATT. William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT’L ECON. L. 17, 48 (2005). One of the most widely praised features of the WTO dispute settlement system is the change to a reverse consensus model, whereby every report is automatically adopted unless all WTO members—including the prevailing party to a dispute—agree that the report should not be adopted.

<sup>85</sup> Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 1, 14–15, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/R (Oct. 4, 1996) [hereinafter *Japan—Alcohol*]. On occasion, the Appellate Body has made reference to unadopted GATT reports. See, e.g., Appellate Body Report, *European Communities—Conditions for the Granting Tariff Preferences to Developing Countries*, ¶ 13, WT/DS246/AB/R (Apr. 7, 2004); discussion in Daniel H. Erskine, *The U.S.—EC Dispute over Custom Matters: Trade Facilitation, Customs Unions, and the Meaning of WTO Obligations*, 18 FLA. J. INT’L L. 423, 461–62 & nn.240–242 (2006).

<sup>86</sup> *Japan—Alcohol*, *supra* note 85.

part of the GATT *acquis*. It also clarified that neither adopted GATT panel reports nor adopted WTO panel reports constitute “subsequent practice” for purposes of Article 31 of the VCLT, thus confirming the lack of formal *stare decisis* in the WTO context.<sup>87</sup>

With respect to these first three categories of decisions, adherence would either be horizontal or vertical (top-down). None of these categories has caused much difficulty. Panels generally refer to previous GATT panel and WTO panel reports where relevant, but the failure to do so has not raised major concerns. The main source of friction that has arisen derives from the failure to adhere vertically, from the bottom up. This scenario is discussed below.

#### 4. *Adopted WTO Appellate Body Reports*

Unsurprisingly, the Appellate Body indicated early in its existence that previous Appellate Body reports are also an important part of the GATT *acquis*, and likewise give rise to legitimate expectations among WTO members.<sup>88</sup> The Appellate Body subsequently stated that “following the Appellate Body’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.”<sup>89</sup>

The Appellate Body provided further guidance on this issue following the panel report in *US—Stainless Steel (Mexico)*, in which the panel declined to follow two previous Appellate Body decisions<sup>90</sup> with respect to the (im)permissibility of simple zeroing.<sup>91</sup>

On the appeal from the panel decision, the E.U., participating as a third party, urged the Appellate Body to adopt a rule *requiring* panels to follow previous Appellate Body decisions:

Although the European Communities acknowledges that case law can change if there are cogent reasons for such a change, such a change could not be justified solely on the basis of a disagreement by the hierarchically lower body with the reasoning of the hierarchically higher body in the WTO dispute settlement system. The European Communities therefore requests the Appellate Body to make it unambiguous that panels are not

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<sup>87</sup> *Id.* (explaining that adopted panel reports “are not binding, except with respect to resolving the particular dispute between the parties.”).

<sup>88</sup> Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, ¶¶ 107–109, WT/DS58/AB/RW (Oct. 22, 2001).

<sup>89</sup> Appellate Body Report, *United States—Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina*, ¶ 188, WT/DS58/AB/RW (Nov. 29, 2004).

<sup>90</sup> *US—Zeroing (EC)*, *supra* note 48; Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, (Jan. 9, 2007) [hereinafter *US—Zeroing (Japan) (AB)*].

<sup>91</sup> This is the most controversial of the “dissenting panel” decisions, because the Appellate Body’s position had already been made quite clear in response to the earlier panel reports. See Sungjoon Cho, *A WTO Panel Openly Rejects the Appellate Body’s “Zeroing” Case Law March 11, 2008; Update: The Appellate Body Has Reversed the Panel’s Departure from the Zeroing Jurisprudence*, ASIL Insights (June 6, 2008), <http://www.asil.org/insights080311.cfm> (characterizing the panel as “rebellious” and describes the report as “highly controversial.”).

only expected, but also obliged, to follow Appellate Body findings.<sup>92</sup>

The Appellate Body reiterated its previous statements regarding past Appellate Body decisions (described above), and then gave additional guidance, stating that “[e]nsuring ‘security and predictability’ in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.”<sup>93</sup>

It is an open issue whether the Appellate Body in *US—Stainless Steel (Mexico)* intended for its “cogent reasons” language to mean that panels can diverge from previous Appellate Body jurisprudence, or if by “adjudicatory body” it intended only to authorize horizontal disregard for precedent—*i.e.* solely that panels can diverge from previous panels, and that the Appellate Body can diverge from previous divisions of the Appellate Body. The Appellate Body had the opportunity to clarify this in the subsequent *US—Continued Zeroing* case, but declined to do so. In that case, the panel indicated that it shared certain concerns raised by the panel in *US—Stainless Steel (Mexico)*,<sup>94</sup> (“we have generally found the reasoning of earlier panels on these issues to be persuasive.”<sup>95</sup>) but ultimately elected to follow the relevant Appellate Body precedents, citing the goals of security and predictability (DSU art. 3.2) and the desirability of prompt resolution of disputes (DSU art. 3.3).<sup>96</sup>

Although the panel followed previous Appellate Body findings with respect to the type of zeroing at issue, the European Communities nonetheless raised what it styled as a “conditional appeal,” arguing that:

if the Panel Report is construed as finding that a panel can invoke “cogent reasons” for departing from previous Appellate Body findings on the same issue of legal interpretation (paragraphs 7.180 and 7.182 of the Panel Report) then the European Communities requests the Appellate Body to modify or reverse those findings and complete the analysis, for all the reasons set out by the Appellate Body in its report in *US—Stainless Steel from Mexico*. The European Communities considered that a panel may invoke “cogent reasons” in order to depart from previous panel findings; but only the Appellate Body can invoke “cogent reasons” in order to depart

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<sup>92</sup> Appellate Body Report, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, ¶ 149 (Apr. 30, 2008), (citations omitted).

<sup>93</sup> *Id.* at ¶ 160. The “cogent reasons” criteria has also been applied by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY): “[the Appeals Chamber] should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice”. *Prosecutor v. Zlatko Aleksovski (Lasva River Valley)*, Case No. IT-95-14/1-A, Appeal Judgement, ¶ 107 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000).

<sup>94</sup> Panel Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 7.168, ¶ 7.181, WT/DS350/R (Oct. 1, 2008) [hereinafter Panel Report, *US—Continued Zeroing*].

<sup>95</sup> *Id.* at ¶ 7.169.

<sup>96</sup> *Id.* at ¶ 7.182. For further discussion of the *US—Stainless Steel (Mexico)* and *United States—Continued Existence and Application of Zeroing Methodology* cases, see *Recent International Decision: International Trade Law—Role of Dispute Settlement Decisions in WTO Law—WTO Appellate Body Re-affirms WTO Inconsistency of “Zeroing.”—Appellate Body Report, United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Apr. 30, 2008), 122 HARV. L. REV. 1993 (2009) [hereinafter *Recent International Decision*].

from previous Appellate Body findings.<sup>97</sup>

The United States argued that the Appellate Body should deny the “conditional appeal,” because the European Communities “is essentially asking the Appellate Body to assess the consistency of the Panel Report with the Appellate Body’s dicta in *US—Stainless Steel (Mexico)*.”<sup>98</sup> For the United States, the Panel “was bound neither by the findings, nor the dicta in a prior, unrelated dispute.”<sup>99</sup> The United States further argued that “the Ministerial Conference and the General Council have the exclusive authority to adopt binding interpretations of the covered agreements under Article IX:2 of the WTO Agreement.”<sup>100</sup> For the United States, treating prior reports as binding outside the scope of the original dispute would add to the obligations of WTO Members, inconsistent with both Articles 3.2 and 19.2 of the DSU.

The Appellate Body declined to clarify this legal question. It determined that the panel had not been clear in its reasoning, such that it was uncertain whether the panel had in fact intended to state that panels can diverge from previous Appellate Body findings. Since the panel in fact did not depart from the previous Appellate Body decisions on point, the Appellate Body determined that there was no need for it to resolve this aspect of the European Communities’ appeal.<sup>101</sup>

It is thus clear that at a minimum, panels must follow Appellate Body precedents absent “cogent reasons.” What is not clear is what constitutes “cogent reasons”, nor whether the EU is correct that panels must always follow the Appellate Body, and it is only in the context of horizontal rather than vertical disagreement where “cogent reasons” come into play. The following Part explores these issues.

## V. SHOULD PANELS BE ABLE TO DIVERGE FROM PREVIOUS APPELLATE BODY JURISPRUDENCE?

This is the question the Appellate Body left unanswered in *US—Continued Zeroing*. In the following sections, I attempt to address this question both as an interpretive matter and as a normative one.

In examining this issue, it bears noting that precedent is not a unitary concept. While some international tribunals have a tradition of following precedent that approaches *stare decisis* (e.g. the European Court of Justice), others take a less rigid stance.<sup>102</sup> Thus there is not a common approach that can be pointed to in

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<sup>97</sup> Notification of an Appeal by the European Communities under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the *Working Procedures for Appellate Review*, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS350/11 (Nov. 10, 2008); appended as Annex 1 to Panel Report, *US—Continued Zeroing*, *supra* note 94.

<sup>98</sup> *Appellee Submission of the United States of America: United States—Continued Existence and Application of Zeroing Methodology*, ¶ 169, AB–2008–11/DS350 (Dec. 1, 2008).

<sup>99</sup> *Id.* at ¶ 169.

<sup>100</sup> *Id.*

<sup>101</sup> *US—Continued Zeroing*, *supra* note 55, ¶ 365.

<sup>102</sup> John Jackson has suggested that precedent should therefore be viewed as a “multi-layered concept” with a variety of approaches existing in the international legal arena. JACKSON, *supra* note 81, at 175.

international law generally. That said, the phenomenon of vertical disagreement recently experienced by the WTO is not unique amongst international tribunals.<sup>103</sup>

#### *A. Guiding Provisions of the Dispute Settlement Understanding and Key Interpretive Principles*

Panels (and the Appellate Body) must conduct their work pursuant to, and in light of, the DSU. There are three provisions of the DSU that are particularly relevant to the question of whether panels may decline to follow Appellate Body precedent—Articles 3.2,<sup>104</sup> 11,<sup>105</sup> and 19.2.<sup>106</sup>

Article 3.2 provides for clarifying provisions “in accordance with customary rules of interpretation of public international law.” The Appellate Body has made it clear from its earliest reports that this language refers to Articles 31<sup>107</sup> and 32<sup>108</sup> of the VCLT.<sup>109</sup>

It is therefore necessary to reconcile DSU provisions in light of the VCLT. The drafting history of the VCLT reflects an intention to apply a textual method of treaty interpretation, rather than “subjective intentions” or a teleological

<sup>103</sup> For example, the Appeals Chambers of the International Criminal Tribunals have expressed (in case law) a rule that the trial chambers must follow the Appeals Chambers decisions, but nonetheless there are examples of trial chambers declining to do so. See generally Xavier Tracol, *The Precedent of Appeals Chambers Decisions in the International Criminal Tribunals*, 17 LEIDEN J. INT'L L. 67 (2004).

<sup>104</sup> DSU art. 3.2 (“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. . . [I]t serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. . . [T]he DSB cannot add to or diminish the rights and obligations provided in the covered agreements”).

<sup>105</sup> *Id.* art. 11 (“[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements . . .”).

<sup>106</sup> *Id.* art. 19.2 (“In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements”).

<sup>107</sup> Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 16, WTO Doc. WT/DS2/AB/R (Apr. 29, 1996). For present purposes, the most relevant parts of Article 31 provide:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . .

<sup>108</sup> *Japan—Alcohol*, *supra* note 85, at 10. Article 32 of the VCLT provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

<sup>109</sup> The words “customary rules of interpretation of public international law” were chosen to reflect that these selected rules within the VCLT have become customary international law, and as such are binding even on WTO members that (like the United States) are not signatories to the Convention. See, e.g., Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5 J. INT'L ECON. L. 17, 18–19 (2002).

approach.<sup>110</sup> Thus the goal is to determine the “objective” intent of the parties, as expressed in the text.<sup>111</sup>

The zeroing cases reveal a tension between the objective of providing security and predictability in Article 3.2, and the mandate for panels to conduct an objective assessment in Article 11. If there is a clash between two provisions however, one could argue that the more specific provision—Article 11—should prevail over the more general one—Article 3.2—pursuant to the principle of *lex specialis*.<sup>112</sup> However, in general, an agreement should be read harmoniously if it is possible to do so.<sup>113</sup> We must therefore determine whether it is possible for a panel to satisfy both provisions if it declines to follow precedent.

Article 31(1) of the VCLT is of particular importance to this inquiry: we must examine the relevant DSU articles in the context of the entire DSU, and in light of the object and purpose of the treaty. In the *US—Continued Zeroing* case, the Appellate Body clarified that:

The principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective.<sup>114</sup>

It went on to indicate that:

We further note that the rules and principles of the *Vienna Convention* cannot contemplate interpretations with mutually contradictory results. Instead, the enterprise of interpretation is intended to ascertain the proper meaning of a provision; one that fits harmoniously with the terms, context, and object and purpose of the treaty. The purpose of such an exercise is

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<sup>110</sup> See discussion in Lennard, *supra* note 109, at 20–22 (detailing International Law Commission commentary on the drafting of the VCLT).

<sup>111</sup> *Id.* at 21. It should be noted that while the Appellate Body usually adopts a highly textual approach to treaty interpretation, this is not always the case. For example, in the *United States—Shrimp* case, the Appellate Body notably took an evolutionary approach to the meaning of the term “exhaustible natural resources” in Article XX(g) of the GATT Agreement. It interpreted the phrase to include sea turtles, even though at the time of the GATT’s drafting in 1947, “exhaustible natural resources” would have been understood to refer to non-living resources such as oil and extractable minerals. For a discussion of this issue, see Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AMER. J. INT’L L. 421, 445 (2008).

<sup>112</sup> There may be some interpretive difficulties with applying *lex specialis* within a WTO Agreement however. First, this principle is not found in the applicable VCLT provisions. And second, the explicit use of *lex specialis* in the interpretive note to Annex 1A (providing that this principle applies in case of a conflict between two different WTO Agreements) may suggest that the lack of reference to *lex specialis* in other contexts means it is unavailable in those contexts. See, e.g., Lennard, *supra* note 109, at 71–72. It is arguable that the Appellate Body endorsed a *lex specialis* approach in the *EC—Bananas* case (*European Communities—Regime for the Importation, Sale, and Distribution of Bananas (EC—Bananas)*, ¶ 204, WT/DS27/AB/R, (Sept. 9, 1997)), in indicating the panel should have first looked to the more specific of two provisions, but it is also possible the Appellate Body was merely making a point about judicial economy. See Lennard, *supra* note 109, at 70–71.

<sup>113</sup> See Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 81, WT/DS98/AB/R (Dec. 14, 1999); Appellate Body Report, *United States—Subsidies on Upland Cotton*, ¶ 549, WT/DS267/AB/R, (Mar. 3, 2005).

<sup>114</sup> *US—Continued Zeroing*, *supra* note 55, ¶ 268.

therefore to narrow the range of interpretations, not to generate conflicting, competing interpretations. Interpretative tools cannot be applied selectively or in isolation from one another. It would be a subversion of the interpretative disciplines of the *Vienna Convention* if application of those disciplines yielded contradiction instead of coherence and harmony among, and effect to, all relevant treaty provisions.<sup>115</sup>

The dissenting panels have particularly emphasized their obligations under Article 11 to perform an objective assessment. The *US—Stainless Steel (Mexico)* panel stated:

7.105 This indicates that even though the DSU does not require WTO panels to follow adopted panel or Appellate Body reports, the Appellate Body *de facto* expects them to do so to the extent that the legal issues addressed are similar. We also note, however, that the panel in *US—Zeroing (Japan)*, while recognizing the need to provide security and predictability to the multilateral trading system through the development of a consistent line of jurisprudence on similar legal issues, drew attention to the provisions of Articles 11 and 3.2 of the DSU and implied that the concern over the preservation of a consistent line of jurisprudence should not override a panel’s task to carry out an objective examination of the matter before it through an interpretation of the relevant treaty provisions in accordance with the customary rules of interpretation of public international law. We also share the concern raised by the panel in *US—Zeroing (Japan)* regarding WTO panels’ obligation to carry out an objective examination of the matter referred to them by the DSB.

7.106 After a careful consideration of the matters discussed above, we have decided that we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple Zeroing in periodic reviews. We are cognizant of the fact that in two previous cases, *US—Zeroing (EC)* and *US—Zeroing (Japan)*, the decisions of panels that found simple Zeroing in periodic reviews to be WTO-consistent were reversed by the Appellate Body and that our reasoning set out below is very similar to these panel decisions. In light of our obligation under Article 11 of the DSU to carry out an objective examination of the matter referred to us by the DSB, however, we have felt compelled to depart from the Appellate Body’s approach for the reasons explained below.

In contrast, the Appellate Body has focused more heavily on DSU Article 3.2. In its report in the *US—Stainless Steel (Mexico)* case, it noted:

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<sup>115</sup> *Id.* at ¶ 273 (citation omitted). See also Bryan Mercurio and Mitali Tyagi, *Treaty Interpretation in WTO Dispute Settlement: The Outstanding Question of the Legality of Local Working Requirements*, 19 MINN. J. INT’L L. 275, 303–04 (2010) (noting that by requiring a holistic exercise, the Appellate Body is staying true to the textual approach favored by the VCLT drafters, rather than preferencing a teleological approach—which would emphasize “object and purpose” above and beyond the other criteria).

In the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play . . . The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU. Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.<sup>116</sup>

The Appellate Body seems to preference Article 3.2 over Article 11. However, the general objective of providing security and predictability must be read in light of the other provisions of the DSU, including Articles 11 and 19.2. If taken to its logical extreme, security and predictability could be accomplished by following the precept that panels will always find in favor of the complainant. But this would seem to strip the "objective assessment" language of Article 11 of its meaning. In order to balance these provisions, it may be useful to apply the good faith obligation of Article 31(1) of the VCLT.<sup>117</sup> If a panel is acting in good faith in conducting its objective assessment, then there should be no complaints that the outcome undermines security and predictability. Further, providing security and predictability cannot come at the expense of conducting an objective assessment or depriving members of their due process or other rights to have their disputes considered in full.

Notwithstanding the Appellate Body's emphasis on Article 3.2, and the panels' focus on Article 11, it would seem these provisions can be read harmoniously *and* allow for a panel to disagree with the Appellate Body. The panel's objective assessment will require it to consider any relevant precedents, and to weigh any systemic effects a contrary decision is likely to have. Most panels, in conducting their objective assessments, will and do choose to follow Appellate Body precedents. It will only be in unusual cases when a panel meets these prerequisites yet nonetheless determines it must disagree.<sup>118</sup> However, assuming the panel undertakes this exercise in good faith, its determination that it should not follow precedent should not be interpreted as either a breach of Article 11 or Article 3.2. In assessing this situation, we must remain mindful of Article 19.2, and the

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<sup>116</sup> *US—Stainless Steel (Mexico)*, *supra* note 73, ¶ 161.

<sup>117</sup> For a discussion of the good faith obligation, see Andrew D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELB. J. INT'L L. 339 (2006); *see also* MARION PANIZZON, *GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT* (2006).

<sup>118</sup> Because this circumstance will be the exception rather than the norm, it will not undermine security and predictability. Instead, if a panel feels strongly that the Appellate Body's jurisprudence is not workable, this may lead the Appellate Body to, if not change its answer, refine its approach. This has in fact happened in the evolution of the Appellate Body's approach to the zeroing cases. Although the outcomes all prohibit zeroing, the Appellate Body's reasoning and logic is much improved in its later decisions.



potential for infringing upon members' rights. At a minimum, there does not appear to be anything in the relevant DSU or VCLT provisions to support a textual interpretation that panels are *required* to follow Appellate Body precedent.

*B. Should panels be precluded from disagreeing with the Appellate Body?*

As a normative matter, there are arguments in favor and against the phenomenon of panels disagreeing with the Appellate Body.

Panels that diverge from previous decisions are arguably not acting in accordance with the objective of the dispute settlement system to provide security and predictability of the multilateral trading system.<sup>119</sup> If disputants have no assurance that panels will follow the logic previously applied by the Appellate Body, it injects a degree of uncertainty into the dispute settlement process. While the final outcome is arguably no less certain—because the Appellate Body is highly likely to reverse any panel finding that contradicts previous Appellate Body determinations—the possibility of a “rogue” panel may make the length of the proceedings less predictable. If a WTO member feels the legal issue involved in a dispute has clearly been resolved by the Appellate Body in a previous dispute, it might logically conclude that a panel would decide in its favor, and that the unsuccessful responding WTO member might well decline to appeal such a panel's ruling. However, if panels routinely disregard previous Appellate Body determinations, then the trajectory of a case may be more likely to lead to an appeal.

On the other hand, there are reasons why we should be cautious in constraining what panels can do. Under the Appellate Body's jurisprudence to date, panels have already been instructed that they are expected to follow Appellate Body decisions where the legal issues are the same as those that have been considered previously. In addition, panels are assisted in their work by the staff of the WTO Secretariat.<sup>120</sup> Staff lawyers from the Rules Division assist in proposing panelists and providing assistance to panels addressing disputes in so-called “rules” cases (*i.e.*, those relating to antidumping, subsidies and countervailing measures and safeguards), while the Legal Affairs Division assists in proposing panelists and supporting panels in non-rules cases arising under the covered agreements.<sup>121</sup> Thus panels, even though appointed on an *ad hoc* basis, are well-informed as to how previous panels and divisions of the Appellate Body have resolved any similar legal issues.<sup>122</sup> Furthermore, it is eminently predictable that if a panel were to go against previous rulings, the Appellate Body would almost certainly reverse it. Thus any panel that chooses to diverge from prior decisions is doing so knowingly, and advisedly. This is unlikely to happen very often. Indeed, even when disagreement

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<sup>119</sup> DSU art. 3.2.

<sup>120</sup> The Appellate Body has its own Secretariat, staffed with lawyers that assist the Appellate Body in conducting its work.

<sup>121</sup> See The WTO: Secretariat and Budget, [http://www.wto.org/english/thewto\\_e/secre\\_e/div\\_e.htm](http://www.wto.org/english/thewto_e/secre_e/div_e.htm).

<sup>122</sup> For discussion of the institutions involved in WTO dispute settlement, see Bruce Wilson, *The WTO Dispute Settlement System and its Operation: a Brief Overview of the First Ten Years*, in RUFUS YERXA AND BRUCE WILSON, EDS., *KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS* 17, 23 (2005).

exists, panels may choose not to go against the Appellate Body's rulings. The panel report in *US—Continued Zeroing* illustrates this choice.<sup>123</sup> Nonetheless, an occasional panel—such as the panels in *US—Zeroing (Japan)* and *US—Stainless Steel (Mexico)*—may have reasons for rejecting the logic applied in previous decisions, and feel that these reasons should be aired, even if the Appellate Body will almost surely reject them. Should panels be foreclosed from expressing themselves in these limited circumstances?

If the WTO had a functioning system of checks and balances whereby the members exercised their legislative functions to correct the judicial arm where appropriate, the answer might be “yes.” However, the WTO is anything but balanced in this regard. The dispute settlement system has been on the whole widely praised, and has been, particularly in its initial years, termed “the jewel in the crown” of the WTO.<sup>124</sup> Although many have proposed reforms to the dispute settlement system of one type or another,<sup>125</sup> the judicial process has been used regularly. Members have initiated over 400 disputes in the sixteen years since the WTO's creation, and there has been a high overall level of compliance with recommendations of the Dispute Settlement Body.<sup>126</sup>

At the same time, the legislative functions of the WTO increasingly have come to be viewed as inefficient or even inoperable. Formally there are rules in place that would permit members to revise the WTO agreements or to announce their own interpretation of a relevant provision. In particular, the Marrakesh Agreement features provisions both permitting the amendment of the covered agreements<sup>127</sup> and for the Ministerial Conference or General Council to issue an authoritative interpretation of treaty terms.<sup>128</sup> However, these processes are viewed as cumbersome<sup>129</sup> and as a practical matter decision-making has been almost entirely conducted in the context of multi-year rounds of trade negotiations that address a multitude of issues.<sup>130</sup> In practice, WTO members do not engage in

<sup>123</sup> The panel indicated its general agreement with prior panels that upheld the permissibility of simple zeroing, but then determined it should nonetheless follow clear Appellate Body precedent.

<sup>124</sup> See, e.g., SYLVIA OSTRY, *REINFORCING THE WTO 20* (1998); Peter Sutherland, *Concluding the Uruguay Round—Creating the New Architecture of Trade for the Global Economy*, 24 *FORDHAM INT'L L. J.* 15, 26 (2000).

<sup>125</sup> Proposed reforms have addressed, inter alia, issues relating to remedies and compliance.

<sup>126</sup> A number of these cases have entailed parallel proceedings in what is essentially one dispute, and a large number of disputes have settled prior to the initiation of the panel process. Nonetheless, the number of disputes that have been heard and resolved through the panel/Appellate Body process is significant. This is particularly the case when contrasted with dispute settlement under the GATT, pursuant to which somewhere in the neighborhood of 135 cases were brought and decided during the GATT's 47-year history.

<sup>127</sup> Marrakesh Agreement, art. X. The amendment provision has been used only once, and not in reaction to a dispute settlement proceeding. See Amendment of the TRIPS Agreement, WT/L/641 (Dec. 8, 2005). This amendment to the intellectual property agreement allows WTO members to produce low-cost generic pharmaceuticals pursuant to compulsory licensing, and to then export such pharmaceuticals to countries lacking the capacity to produce them through domestic capacity.

<sup>128</sup> Marrakesh Agreement, art. IX.2. This provision has never been invoked. See, e.g., Claus-Dieter Ehlermann and Lothar Ehring, *The Authoritative Interpretation Under Article IX: 2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, 8 *J. INT'L ECON. L.* 803 (2005).

<sup>129</sup> See, e.g., William J. Davey, *Institutional Framework*, in *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS* 53, 85 (2005) (noting that amending the GATT had been viewed as all but impossible, yet the GATT provisions were imported into the WTO).

<sup>130</sup> Thomas Cottier, *A Two-Tier Approach to WTO Decision-Making*, in *REDESIGNING THE*

legislative activity in response to panel and Appellate Body reports adopted by the DSB, no matter how controversial the decision.<sup>131</sup> Thus, there is not an effective legislative check in place to ensure panels<sup>132</sup> and the Appellate Body reach outcomes with which the members agree.<sup>133</sup>

To the extent one might worry about “judicial activism,” such concerns should be magnified in a system where there is no functioning check on the judiciary. If the judiciary’s function is to interpret the law, and the legislative branch can change the law, then the judiciary can in some ways be kept in line if deemed necessary. However, when the legislature either cannot, or will not, change the law, then there is no real limitation placed on the judiciary, aside from any political factors that may temper judicial behavior.<sup>134</sup>

In this context, I am far more sympathetic to the efforts of panels to suggest alternative lines of reasoning or treaty interpretation, even when these clash with previous Appellate Body decisions. For at present, there is no meaningful review of Appellate Body decisions. To the extent panels raise new arguments, identify flaws in previous Appellate Body reasoning, and point out the systemic difficulties with previous jurisprudence, they are contributing to the strengthening of the dispute settlement system, not its undoing. Such decisions force the Appellate Body to sharpen its reasoning and to consider arguments it may not have fully grappled with in the first instance. In other words, disagreement *between* panels and the Appellate Body serves some of the same useful functions that dissents *within* a panel serve. It is likely that WTO dispute settlement is going to get more, rather than less, complicated. To the extent there are “easy” disputes, such disputes are increasingly likely to be resolved outside the dispute settlement

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WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY 42, 48 (Debra P. Steger, ed., 2009). The current Doha Round has been under negotiation since late 2001.

<sup>131</sup> *Id.*; see also Ehlermann, *supra* note 2020, at 485 (noting that even in the face of a controversial decision, “no sustained attempt has been made to channel the criticism voiced by a large majority of Members in the DSB against the Appellate Body’s findings concerning unsolicited amicus curiae briefs into one of the procedures provided for by Article IX or X of the Marrakesh Agreement.”).

<sup>132</sup> If a panel report is appealed, the Appellate Body will have the opportunity to correct any errors. However, when panel reports have not been appealed, the WTO membership has never taken any formal action to correct misinterpretations of the covered agreements. As an example, the compliance panel in the *Australia—Leather* dispute was widely criticized for authorizing a remedy that required that an illegal subsidy be repaid (WTO remedies are, as a rule, not retrospective in nature), but the case was not appealed and the WTO membership took no steps to reverse the result through legislative action. Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW (Jan. 21, 2000).

<sup>133</sup> There has been one notable instance when the vast majority of the WTO membership reacted negatively to a decision of the Appellate Body. The Appellate Body determined that it had the authority (drawing upon very general language in Article 13 of the DSU) to accept amicus briefs and establish procedures for their submission and consideration. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 6, 1998). At a special meeting of the General Council, the majority of the delegations that spoke raised objections to the Appellate Body’s actions, arguing that the Appellate Body did not have the power to accept amicus briefs and was overstepping its mandate. Notwithstanding the widespread dissatisfaction with the Appellate Body’s ruling, no efforts were made to either issue an authoritative interpretation under Article IX of the Marrakesh Agreement or to amend the DSU, under Article X of the Marrakesh Agreement. Members simply have not used these mechanisms in response to panel or Appellate Body decisions, and seem unlikely to do so in the future.

<sup>134</sup> See Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 263–65 (2004) (identifying political checks on judicial activism by the Appellate Body).

process or in the initial phases of a dispute.<sup>135</sup> The dispute settlement system is therefore likely to face more difficult cases going forward, including cases where the highly textual style of analysis favored by the Appellate Body may not yield a clear answer due to gaps in the treaty language or unclear provisions. These are precisely the cases where the Appellate Body is most vulnerable to charges of being “activist” and to being criticized (even if not corrected) by WTO members.

Vertical disagreement can therefore be seen as a dialogue between a panel and the Appellate Body (or perhaps between the Rules or Legal Affairs Division and the Appellate Body Secretariat), where the panel is signaling interpretive or practical problems with the Appellate Body’s previous decision or decisions. This appears to be what the *US—Zeroing (Japan)* and *US Stainless Steel—Mexico* panels were attempting to do. Surely both panels knew they would be reversed on the law.<sup>136</sup> However, they felt the Appellate Body’s decision in *US—Zeroing (EC)* left open potentially anomalous situations, as well as appeared to render a portion of the ADA inutile. When the Appellate Body in the *US—Zeroing (Japan)* case did not respond fully to aspects of the panel’s legal analysis,<sup>137</sup> the *US Stainless Steel—Mexico* panel subsequently highlighted these gaps in the Appellate Body’s analysis as a partial explanation for why it felt it necessary to raise afresh arguments that the *US—Zeroing (Japan)* panel had made, but the Appellate Body had rejected.<sup>138</sup>

Thus as a general matter it would be a mistake for the Appellate Body to foreclose the possibility of panels disagreeing with the Appellate Body. If the “absent cogent reasons” language is interpreted to mean only that panels may diverge from previous panel decisions, and that Appellate Body divisions may diverge from previous Appellate Body decisions, then panels will as a practical matter have little about which they would have occasion to disagree. Approximately 70 percent of panel reports have been appealed.<sup>139</sup> Therefore, the number of unappealed panel reports is relatively small. And to the extent a panel makes a decision that is controversial, it is probably more likely to be appealed (and

<sup>135</sup> Members have the benefit of the cases that have already been decided, and may therefore decide to “bargain in the shadow of the law.” Research suggests that members do bargain in the shadow of the law, even though WTO law can be termed “weak” in that it can be difficult (and occasionally impossible) to get a member to comply with an adverse ruling. See Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 *FORDHAM INT’L L. J.* 158 (2000); Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 *J. OF LEGAL STUD.* 225 (1982).

<sup>136</sup> As is discussed below, the *US—Zeroing (EC)* and *Softwood Lumber V (21.5)* panels may also have been engaging in similar signaling efforts, though it was less obvious that the Appellate Body would reverse these panels as it had not yet issued a report assessing the types of zeroing these panels addressed.

<sup>137</sup> See, e.g., Voon, *supra* note 52, at 225 (noting that the Appellate Body in *United States—Zeroing (Japan) (AB)*, *supra* note 90, conducted little positive analysis, and instead mainly rebutted the panel on the question of whether simple zeroing was inconsistent in new shipper and periodic (administrative) reviews, as such, with ADA arts. 2.4, 9.3, and 9.5).

<sup>138</sup> See, e.g., *US—Stainless Steel (Mexico)*, *supra* note 73, ¶¶ 7.118–121 (identifying, with respect to issues arising under Articles VI:1 and VI:2 of GATT 1994 and ADA art. 2.1, arguments of the *US—Zeroing (Japan)* panel the Appellate Body had not addressed and issues for which the Appellate Body had not provided detailed reasoning to support its position), 7.127–133 (discussing, with respect to ADA art. 9.3, why it disagrees with the Appellate Body’s rejection of the *US—Zeroing (Japan)* panel’s arguments), 7.137–143 (identifying flaws in the Appellate Body’s logic in *US—Zeroing (Japan)* with respect to whether the Appellate Body’s approach renders inutile part of ADA art. 2.4.2), and 7.146–147 (identifying potential negative consequences of establishing a general prohibition on zeroing).

<sup>139</sup> See World Trade Organization, *Appellate Body Annual Report for 2010*, WT/AB/15 (July 18, 2011) (sixty-seven percent of panel reports issued between 1995 and 2010 were appealed).

therefore off limits for future disagreement) than a non-contentious report.

There is no suggestion that dissent *within* a panel is impermissible, even when the dissenter's basis for disagreeing lies in the belief that Appellate Body precedent is incorrect. It would be incongruous to impose more restrictions on panels when their level of concern with previous Appellate Body rulings rises to the level of a majority (or unanimity) within the panel. To the extent that there is value in airing disagreement at all, it would seem that value increases when there is more, rather than less, disagreement.

Further, if the Appellate Body were to interpret its previous language to mean that panels *must* follow all Appellate Body precedents, this would arguably violate Articles 3.2 and 19.2 of the DSU by diminishing the rights of members, and violate Article 11 by preventing panels from conducting an objective assessment. Let us assume that the Appellate Body were to adopt such a rule. If a future zeroing-related dispute arose between two WTO members heretofore uninvolved in the zeroing cases, the respondent would have less of a true opportunity to have its defense heard than if the panel had the flexibility to consider new arguments, even if such arguments called into question Appellate Body precedent. Further, the panel's ability to objectively assess new arguments and new contexts fully would be constrained by the requirement to follow precedent. This would have the practical effect of imposing *stare decisis* in the WTO context, and would arguably deny WTO members involved in subsequent disputes of due process.<sup>140</sup> The panel in *US—Stainless Steel (Mexico)* shared this concern:

We recall that we are not, strictly speaking, bound by previous Appellate Body or panel decisions that have addressed the same issue, *i.e.* simple zeroing in periodic reviews, which is before us in these proceedings. There is no provision in the DSU that requires WTO panels to follow the findings of previous panels or the Appellate Body on the same issues brought before them. In principle, a panel or Appellate Body decision only binds the parties to the relevant dispute. Certain provisions of the DSU, in our view, support this proposition. According to Article 19.2 of the DSU, for example, “[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements. In the same vein, Article 3.2 of the DSU provides that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”<sup>141</sup>

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<sup>140</sup> The Appellate Body has stated that the obligation to afford due process is “inherent in the WTO dispute settlement system.” Appellate Body Report, *Chile—Price Band System and Certain Measures Relating to Certain Agricultural Products*, ¶ 176, WT/DS 2017/AB/R (Sept. 23, 2002). See also Appellate Body Report, *Mexico—Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States*, ¶ 107, WT/DS132/AB/RW (Oct. 22, 2001); Appellate Body Report, *Thailand—Antidumping Duties on Angles, Shapes and Section of Iron or Non-alloy Steel and H-Beams from Poland*, ¶ 88, WT/DS/122/AB/R (Mar. 12, 2001); Appellate Body Report, *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, ¶ 433, WT/DS321/AB/R (Oct. 16, 2008).

<sup>141</sup> *US—Stainless Steel (Mexico)*, *supra* note 73, ¶ 7.102.

C. *What Would Constitute “Cogent Reasons” to Disregard Precedent?*

The above analysis leads to the conclusion that it is undesirable to require panels to follow Appellate Body precedent in all cases. At the same time, panels should not disregard precedent lightly. In a two-tiered system of dispute settlement, it is logical to expect the lower tier to follow the lead of the top tier. And in light of the DSU’s stated objective in Article 3.2 of providing security and predictability to the multilateral trading system, it must be acknowledged that following precedent does contribute to security and predictability. It is therefore appropriate to follow Appellate Body precedent unless there is a strong countervailing reason not to. The Appellate Body’s requirement in *United States—Stainless Steel (Mexico)* of “cogent reasons” seems reasonable in this regard. But what would constitute cogent reasons?

Before reaching this question, a panel must conduct its analyses consistent with the provisions of the DSU. It is therefore a prerequisite for any panel considering diverging from precedent to have: assessed the factual and legal issues in good faith; conducted an objective assessment of the matter before it; ensured its outcome will not add to or diminish the rights and obligations of WTO members; and applied the VCLT rules of treaty interpretation, particularly being mindful that the object and purpose of WTO dispute settlement is in part to provide security and predictability in the multilateral trading system.<sup>142</sup> Assuming that a panel has followed the procedural mandates of the DSU and has determined that diverging from precedent would, in the given case, not be inconsistent with those mandates, it could then opt to disregard precedent, but only in the presence of cogent reasons. Below I identify four possible factors<sup>143</sup> to take into account when determining whether cogent reasons exist.

1. *Where a textual interpretation either has not been conducted or has not yielded a clear and definitive result*

In the zeroing cases, part of the difficulty has arisen from the fact that, particularly in its earliest decisions on the subject, the Appellate Body did not ground its reasoning in the text of the Antidumping Agreement. It has relied on terminology such as “the product as a whole” that is found nowhere in the treaty, but rather was suggested by the European Communities in their briefs. This has opened the Appellate Body to criticism that it is taking too much of a teleological approach or, to put it more critically, that it is being activist.<sup>144</sup> In the zeroing context, many would argue that a textual approach was possible. However, in some instances, the relevant treaty text will be unclear or silent with respect to a particular issue. In this context, the Appellate Body may find it necessary to engage in a degree of gap-filling. To the extent gap-filling is required in certain contexts,

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<sup>142</sup> DSU arts. 3.2, 11, 19.2.

<sup>143</sup> These are intended to be illustrative examples rather than to comprise a closed list of possibilities.

<sup>144</sup> Not everyone disapproves of the teleological shift. Sungjoon Cho readily acknowledges the teleological nature of the Appellate Body’s zeroing jurisprudence, but applauds rather than condemns the change in approach. Sungjoon Cho, *Global Constitutional Lawmaking*, 31 U. PENN. J. INT’L L. 621 (2010).

this is where the Appellate Body is going to be most vulnerable to criticism and where allowing all views to be aired will help to provide some added legitimacy to a controversial undertaking.<sup>145</sup>

2. *Where the area under consideration has not crystallized into a definitive, accepted practice*

Many Appellate Body reports have established tests to interpret particular treaty provisions, and others have made a variety of interpretive pronouncements. These tests and pronouncements have then been used in numerous subsequent cases over a period of many years.<sup>146</sup> It would be less appropriate for a panel to try to design a new test or legal principle in such circumstances (particularly if there had not been any major concerns raised about the workability thereof) than if there had been only one isolated application of a legal principle by the Appellate Body. This is not to suggest that panels should make it their business to design new tests as a routine matter, but rather to say that the more well-accepted (by other panels as well as the Appellate Body) and frequently applied a legal principle is, the less likely there would be cogent reasons for diverging from said principle.<sup>147</sup> In the context of the zeroing cases, the findings with respect to the WA-WA methodology provide a useful example. No panel (or Appellate Body division) has ever found zeroing in the WA-WA context to be permissible. All of the disagreement arises out of the use of zeroing in contexts other than WA-WA comparisons. Because there has been sustained unanimity on this issue at both panel and Appellate Body level, it would be difficult to imagine a cogent reason for a panel to now argue that zeroing in the WA-WA context *is* permissible.

3. *Where the legal issue is likely to be subject to repeated consideration in a variety of contexts*

Certain disputes revolve around legal questions that are likely to recur, albeit in different guises, while others involve more esoteric questions that may not arise again. For the former, it is particularly important that panel and Appellate Body decisions be carefully crafted so as not to create a difficulty for a later, related

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<sup>145</sup> A teleological approach may be appropriate where a textual interpretation does not yield a clear result. I am therefore not arguing against teleological interpretations in general, but instead noting that when such an approach is used, it may be particularly appropriate to ensure any objections thereto are voiced.

<sup>146</sup> For example, the tests from the Appellate Body report in the *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R (Oct. 20, 1998), case have been used in multiple cases to interpret Articles 5.1 and 5.6 of the Sanitary and Phytosanitary Measures (SPS) Agreement.

<sup>147</sup> Interestingly, in a recent article Sungjoon Cho has suggested that the Appellate Body's zeroing jurisprudence represents, in its decision not to apply a textual, VCLT approach, a form of constitutional lawmaking. He suggests that as a form of constitutional lawmaking, the current jurisprudence should not be subject to reversal via a declaration, which could be negotiated amongst WTO members. Instead, he argues that the zeroing decisions should only be subject to change via the supermajority amendment rules in Article X of the Marrakesh Agreement. Cho, *supra* note 144, at 652. I disagree with this suggestion. The fact that the Appellate Body has chosen a teleological path in the zeroing cases should not elevate these decisions above and beyond the status of any other decisions. Given that these decisions were reached using a methodology different from that prescribed by the WTO membership, it would be particularly inappropriate to privilege these decisions.

fact situation. Because these decisions are likely to have ramifications in numerous further cases, it is more important that any flaw in the initial case reasoning be identified so that it may be corrected relatively early in the chain of decisions.<sup>148</sup>

4. *Where the panel has a new argument to make or determines additional Appellate Body clarification is necessary*

If a panel disagrees with Appellate Body logic but has no new arguments to make other than those already raised by previous panels *and* thoroughly addressed by the Appellate Body, it is unlikely to have cogent reasons to diverge from the Appellate Body precedent because it is not disagreeing in furtherance of the dialectic. The balance between conducting an objective assessment pursuant to Article 11 of the DSU and the goal of providing security and predictability dictates this result. If the Appellate Body has already considered and rejected precisely the arguments a panel would raise, the panel should not re-raise these issues. The panel could, if it felt so compelled, note that it agrees with the previous rejected arguments while nonetheless following the Appellate Body's rulings. This was the approach adopted by the panel majority in the *US—Continued Zeroing*<sup>149</sup> case.

## VI. PUTTING THE DISSENTING PANELS TO THE TEST

There have been four panels that have arguably dissented from previous Appellate Body rulings, all in the context of zeroing. These four panels each issued reports upholding the use of at least one form of zeroing: *US—Zeroing (EC)*; *US—Softwood Lumber V (21.5)*;<sup>150</sup> *US—Zeroing (Japan)*; and *US—Stainless Steel (Mexico)*. The first of these panels comprised two members finding a form of zeroing to be permissible and one member dissenting from this view. The subsequent three panels were each unanimous in finding that at least one form of zeroing was permissible. In all four cases, the Appellate Body reversed the findings that any form of zeroing was permissible. This section briefly discusses the ways in which each panel characterized their disagreement with the Appellate Body's previous determinations (which began with the *EC—Bed Linen* case in 2001)<sup>151</sup>

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<sup>148</sup> Judge Patricia Wald supports this approach: “[o]n the heated issue of duress as a defense to a war crime or crime against humanity, the ICC-written law has chosen to follow the dissent of ICTY President Antonio Cassese rather than the ICTY majority in supporting such a defense. This example, incidentally, reinforces for me the value of dissent in a rapidly moving international jurisprudence. Originally, some scholars thought dissents should not be allowed in order to preserve the cloak of unity. Time has, I believe, shown that in international courts, as well as national ones, dissent is especially vital and particularly useful when precedent does not rule out choices for later courts, and yet there may be few, if any, rulings in different courts for newly-constituted courts to choose from.” See Patricia M. Wald, *Tribunal Discourse and Intercourse: How the International Courts Speak to One Another*, 30 B.C. INT’L & COMP. L. REV. 15 (2007). Judge Wald served on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1999. She was also a judge at the UN International Criminal Tribunal for the former Yugoslavia from 1999 to 2001.

<sup>149</sup> Panel Report, *US—Continued Zeroing*, *supra* note 94.

<sup>150</sup> 21.5 refers to proceedings under Article 21.5 of the DSU, pursuant to which a panel determines whether a member previously found to have been in violation of a WTO commitment has in fact complied with the recommendations of the Dispute Settlement Body that the member bring its measures into conformity with the relevant covered agreements.

<sup>151</sup> *EC—Bed Linen*, *supra* note 47.



finding various uses of zeroing to be inconsistent with the WTO's ADA. It additionally assesses in each instance whether the panel's vertical disagreement is problematic given the criteria identified above.

*A. US—Zeroing (EC)*

This dispute involved challenges to the use of zeroing in the WA-WA context (what the EC refers to as “model zeroing”) and to the use of zeroing in the WA-T context (which the EC refers to as “simple zeroing”). With respect to the question of WA-WA or model zeroing, the panel noted that the legal issue was “identical” to that addressed by the Appellate Body in *EC—Bed Linen* and *US—Softwood Lumber V* and stated that while “previous Appellate Body decisions are not strictly speaking binding on panels, there clearly is an expectation that panels will follow such decisions in subsequent cases raising issues that the Appellate Body has expressly addressed.”<sup>152</sup>

The EC argued that the Appellate Body's logic in *EC—Bed Linen* and *US—Softwood Lumber V* should lead to the conclusion that zeroing is also impermissible in the WA-T or simple zeroing context.<sup>153</sup> However, the panel distinguished the previous cases, noting that the relevant provision of the Antidumping Agreement at issue in the earlier disputes (Article 2.4.2) refers to “the investigation phase.” In the present dispute, zeroing had been used in WA-T comparisons in new shipper reviews, changed circumstances reviews, administrative reviews, and sunset reviews—but not in original investigations. The reviews at issue are governed by Article 9.3 of the ADA. The panel thus addressed whether the requirements of Article 2.4.2 apply outside the context of original investigations to the reviews covered by Article 9.3, finding in the negative.<sup>154</sup> One panelist disagreed with this latter conclusion and would have found zeroing prohibited in the WA-T transactions at issue.

This panel was the first to address zeroing outside of the WA-WA context. Although the Appellate Body's reasoning in the WA-WA cases may have suggested that it would not approve of zeroing in other contexts, the Appellate Body had not in fact opined as to these issues. Thus this panel was able to distinguish the issue of zeroing in the context of particular WA-T comparisons from the question the Appellate Body had previously addressed and did not disagree with an explicit finding of the Appellate Body. Because this panel was faced with a novel issue of law, it cannot be faulted for conducting its own analysis. Indeed, the panel did a laudable job of using the text to explain why it felt the Appellate Body's 2.4.2 analysis should not apply to Article 9.3. The panel may have intuited the direction the Appellate Body would be inclined to take and as such spelled out the logic of its own approach. The panel thus set the stage for a dialogue over the new legal issue.

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<sup>152</sup> *US—Zeroing (EC)*, *supra* note 48, ¶¶ 7.28–7.31.

<sup>153</sup> *Id.* at ¶ 7.144.

<sup>154</sup> *Id.* at ¶ 7.148–7.220.

*B. US—Softwood Lumber V (21.5)*

In the original *US—Softwood Lumber V* case, the United States had engaged in zeroing in the context of conducting a weighted average—weighted average comparison. The panel had found two to one, and the Appellate Body had affirmed, that zeroing was not permitted in the WA-WA context. This was consistent with the Appellate Body’s finding in the *EC—Bed Linen* case, which had also addressed zeroing in the WA-WA context. Subsequently, the United States elected to comply with the *Softwood Lumber V* reports by altering its methodology to compare sales using the transaction-to-transaction (T-T) methodology and to use zeroing in this context. Canada initiated a proceeding pursuant to Article 21.5 of the DSU, arguing that zeroing is also prohibited in the T-T context and that therefore the United States was not in compliance with the original findings.

Canada argued that the Appellate Body’s logic in finding zeroing impermissible in the WA-WA context dictated a similar finding for zeroing in the T-T context.<sup>155</sup> The United States responded that while the Appellate Body had relied on the terms “margins of dumping” and “all comparable export transactions” in Article 2.4.2 of the ADA to find zeroing impermissible in the WA-WA context, these terms only appear in reference to WA-WA comparisons, and not in the part of 2.4.2 directed at T-T comparisons.<sup>156</sup>

The panel emphasized that the Appellate Body had limited its consideration to the WA-WA context, and that the Appellate Body’s reasoning, while logical in the WA-WA context, did not marry well with the portion of Article 2.4.2 directed at T-T comparisons. The panel agreed with the United States that the terms “margins of dumping” and “all comparable export transactions” do not apply to T-T comparisons and concluded that zeroing in the context of T-T comparisons is permissible.<sup>157</sup>

The panel then went further and engaged in a lengthy discussion of why it would pose interpretive problems to extend the Appellate Body’s *Softwood Lumber V*<sup>158</sup> analysis beyond the WA-WA context.<sup>159</sup> This exposition was not necessarily essential to the resolution of the dispute and perhaps signals that the panel believed the Appellate Body was likely to extend its findings with respect to zeroing beyond the WA-WA context. To be more precise, it seems likely that the Rules Division lawyers recognized that the Appellate Body (supported by the Appellate Body Secretariat lawyers) would be inclined to extend its zeroing findings and had concerns that such an outcome would prove problematic. The Rules Division may therefore have encouraged the panel to develop the dicta in this panel report as a way for itself to engage indirectly in a dialogue with the Appellate Body and its Secretariat lawyers. In any event, as with the *US—Zeroing (EC)* panel, while the

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<sup>155</sup> *US—Softwood Lumber V (21.5)*, *supra* note 73, ¶¶ 5.11–5.14.

<sup>156</sup> *Id.* at ¶ 5.15.

<sup>157</sup> *Id.* at ¶¶ 5.20–5.30.

<sup>158</sup> The panel circulated its final report on April 3, 2006 and therefore did not have the benefit of the Appellate Body’s decision in *US—Zeroing (EC)* (in which the Appellate Body reversed the panel’s finding that zeroing was permissible in reviews conducting using the WA-T methodology), as that report had not yet been circulated. The timing was very close however; the Appellate Body report in *US—Zeroing (EC)* was circulated on April 18, 2006.

<sup>159</sup> *US—Softwood Lumber V (21.5)*, *supra* note 73, ¶ 5.31–5.66.

panel disagreed with the position the Appellate Body was *likely* to take, it did not diverge from any substantive legal findings of the Appellate Body.

The *US—Zeroing (Japan)* case was the first zeroing dispute in which a panel explicitly disagreed with previous Appellate Body precedent. Shortly after this panel circulated its interim report, the Appellate Body issued its report in *US—Zeroing (EC)* (finding WA-T zeroing impermissible). The *US—Zeroing (Japan)* panel deferred the release of its final report to allow the parties to address in what ways they felt the panel should take into account the Appellate Body's rulings. The panel found zeroing prohibited in the WA-WA contexts at issue.<sup>160</sup> However, it declined to follow the Appellate Body's reasoning in *US—Zeroing (EC)* with respect to zeroing in the WA-T context, and found that numerous instances of WA-T and T-T zeroing were permissible.<sup>161</sup> This case engendered negative feelings amongst some delegations and lawyers within the Appellate Body Secretariat, as some believed the panel had called particular attention to itself and its refusal to follow precedent by delaying its decision yet not altering its conclusion, notwithstanding the Appellate Body's clear, contrary position with respect to zeroing in the WA-T context.

The panel made reference to certain arguments raised by the *US—Zeroing (EC)* and *US—Softwood Lumber V (21.5)* panels, but also applied its own detailed interpretation of the relevant ADA provisions, using the VCLT to examine the interconnections between treaty provisions. The panel was particularly concerned that following the Appellate Body's approach would render a portion of Article 2.4.2 inutile, arguing that prohibiting zeroing in the WA-T context as well as the WA-WA context would make it impossible to give effect to all three listed methodologies, as the WA-T methodology would necessarily generate mathematically equivalent results to the WA-WA methodology.<sup>162</sup> The panel made clear that its own answers were not entirely satisfactory, but that for systemic purposes, its approach was preferable to the Appellate Body's:

[W]hile we realize that certain anomalies arise if Article 2.4.2 is interpreted as only prohibiting the use of zeroing in connection with the average-to-average comparison method, we consider that an interpretation of Article 2.4.2 as prohibiting zeroing under all comparison methods is even more problematic from the perspective of a coherent approach to the interpretation of Article 2.4.2.<sup>163</sup>

Thus it appears that this panel—which included two long-term government trade officials and a lawyer with an antidumping practice—was grappling with establishing an approach that would be coherent across all of the different comparisons permitted by Article 2.4.2, while being consistent with a VCLT analysis. The panel was rather brave to speak out in opposition to the Appellate Body's approach, and its arguments, while some may disagree with them on

<sup>160</sup> *US—Zeroing (Japan)*, *supra* note 51, ¶¶ 7.82–7.86.

<sup>161</sup> The Appellate Body's report in *US—Softwood Lumber V (21.5)* (in which it found instances of T-T zeroing impermissible) was issued close in time to this report, but likely was not available in time for this panel to reference it.

<sup>162</sup> *US—Zeroing (Japan)*, *supra* note 51, ¶¶ 7.115–7.161.

<sup>163</sup> *Id.* at ¶ 7.126.

substance, were certainly not spurious. The panel identified a number of issues for which the Appellate Body's reasoning would prove problematic, and it was therefore useful for the panel to express these concerns, extending the panels' dialectic with the Appellate Body.

### C. *US—Stainless Steel (Mexico)*

By the time the *US—Stainless Steel (Mexico)* panel issued its report, the Appellate Body had issued its reports in *US—Zeroing (EC)*; *US—Softwood Lumber V (21.5)*, and in *US—Zeroing (Japan)*—all reports where the Appellate Body uniformly rejected as impermissible every type of zeroing challenged. Further, the preceding two panels had gone into great detail as to why they believed the Appellate Body should limit its prohibition on zeroing to the WA-WA context, yet the Appellate Body had roundly rejected all of these arguments.

The panel found, as all panels have, that the challenged uses of zeroing in the WA-WA context were WTO-inconsistent. However, the panel denied Mexico's claims with respect to zeroing in the WA-T context, largely relying upon arguments the Appellate Body had rejected in its *US—Zeroing (Japan)* report. The panel made clear that it was aware of the Appellate Body's previous rulings, but identified a number of issues for which it believed the Appellate Body had not fully enough explained its positions.<sup>164</sup> In addition, the panel explained in some detail why it disagreed with certain legal determinations the Appellate Body had reached, why those determinations were problematic more broadly, and why it therefore could not follow those decisions.<sup>165</sup>

Many reacted negatively to this panel's actions, calling it "rebellious"<sup>166</sup> and objecting strongly to its failure to follow precedent. There appeared to be a general frustration in Geneva that panels were persisting on finding zeroing permissible, even though it was entirely clear the Appellate Body would overrule them. Indeed, the Appellate Body itself responded (in addition to overruling the panel on the findings permitting zeroing) by strongly emphasizing the expectation that precedent be followed. Nonetheless, the Appellate Body also responded to a variety of issues raised by the panel.<sup>167</sup> Although it may not have done so to the satisfaction of the panel and others who fundamentally disagree with the Appellate Body's position, it did at least continue to advance the dialogue.

This panel seemed clearly to recognize that it would be reversed with respect to its findings permitting zeroing. In this regard, the panel report appears to have had the objective of conveying to the Appellate Body the difficulties the Appellate Body's decisions could cause for WTO members in their administration of members' antidumping laws. As such, the panel seems to be imploring the Appellate Body to give fuller, more detailed guidance and explanations with respect

<sup>164</sup> *US—Stainless Steel (Mexico)*, *supra* note 73, ¶¶ 7.118–7.121.

<sup>165</sup> *Id.* ¶¶ 7.127–7.147.

<sup>166</sup> See Cho, *supra* note 92.

<sup>167</sup> For detailed discussions of the Appellate Body's decision, see *Recent International Decision*, *supra* note 96, at 122; Simon Lester, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, 102 AM. J. INT'L L. 834 (2008); Eric Langland, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico: Row over Zeroing Reveals Judicial Quagmire*, 17 TULANE J. INT'L & COMP. L. 555 (2009).

to some of the more contested legal issues. Hence while the panel is clearly disagreeing with the Appellate Body's previous decisions, and in some senses its actions can be seen as a last ditch effort to convince the Appellate Body of interpretations it had already rejected,<sup>168</sup> it does not seem to be acting lightly. It is attempting to advance the discussion by encouraging the Appellate Body to further clarify the reasoning of its own decisions. For these reasons, the panel does not deserve the harsh criticisms some have leveled against it.

## VII. CONCLUSION

Both horizontal and vertical disagreement can serve useful functions in WTO dispute settlement. Dissent, in whatever form, can be seen as an effort to engage in a dialectic or dialogue. In the case of horizontal disagreement, dissent within a panel conveys useful information to the Appellate Body—namely that there are competing approaches to the legal issue at hand. The Appellate Body's decision will benefit from this knowledge, as the Appellate Body will consider both approaches, and expound upon why one or the other is more persuasive and thus preferred. In practice, the reasoning applied in panelists' dissents has been adopted by the Appellate Body on more than one occasion. Yet even when the dissenter's view is not adopted, it still should not be seen as "wrong" or "unnecessary" as the presence of the minority position will require the Appellate Body to provide reasoning that will be useful guidance for WTO members and for future panelists.

Vertical dissent poses potentially more serious concerns because wholesale failure of panels to follow Appellate Body precedents could undermine and ultimately destroy the WTO dispute settlement system. However, the Appellate Body has struck the proper balance by stating that "absent cogent reasons" previous decisions should be followed. This leaves open the possibility that panels could have good cause to diverge from previous decisions of the Appellate Body. If a panel is acting in good faith, and nonetheless believes its duties under the DSU require it to reject Appellate Body precedent, then cogent reasons may exist for this view. There are many possible cogent reasons; this article suggests but four possible ones. The important point is not to definitively identify all potential cogent reasons, but instead to acknowledge that such circumstances, albeit rare, may arise. Should a panel have cogent reasons to diverge, it should be permitted to do so. Its reasoning should be taken as an attempt to engage in a constructive dialogue with the Appellate Body; to address and ideally remedy concerns raised by the Appellate Body's original logic.

Although the zeroing cases have revealed high levels of disagreement between panels and the Appellate Body, these "dissenting panels" do not signal a breakdown in the hierarchy, or any other grave problem. In a system where there is little effective check on the Appellate Body, it is important that panelists—who may have practical experience with the issues—be able to identify potential difficulties with the Appellate Body's analyses. Airing disagreement has served

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<sup>168</sup> Indeed, the next zeroing panel (*US—Continued Zeroing*), although in agreement with the substance of the *US—Stainless Steel (Mexico)* and *US—Zeroing (Japan)* panel reports, apparently saw no room for further dialogue and thus followed the Appellate Body's precedents. See *US—Continued Zeroing*, *supra* note 56, ¶¶ 7.168–7.182.

useful purposes in WTO dispute settlement as dialectic, whether expressed horizontally or vertically.

*Within* a panel, dissent illustrates competing approaches to the same issue. Both sides will sharpen their reasoning to highlight their unique points of view. This exposition of disagreement in turn can be useful to the Appellate Body, which has the opportunity to evaluate the merits of the different arguments. The Appellate Body has in fact adopted the views of dissenting panelists on multiple occasions, illustrating the usefulness of these expressions of disagreement.

*Between* panels and the Appellate Body, disagreement will be rarer, but therefore usually of significance when it occurs. If a panel feels strongly enough to object to Appellate Body precedent, it likely signals a serious concern that the Appellate Body's reasoning is questionable or may lead to later undesirable outcomes. In this context, it is better for the Appellate Body to be given the opportunity to refine and/or further explain its reasoning (as it has done in the later zeroing reports) than for a series of ultimately unsatisfying and problematic reports to accumulate. Assuming that panels have cogent reasons for disagreeing, it should be the case that the decision to pursue a dialogue with the Appellate Body either serves a positive purpose or, at a minimum, will not cause more harm than good.

In the context of the zeroing cases, the process has been surprising, but the end result can be viewed as a success for the system. Panels aired their concerns with the initial Appellate Body reports, and the Appellate Body responded by using more complete reasoning and more faithful reference to the VCLT in its later reports. This cycle has reflected the use of the dialectical process to ultimately reach better outcomes in WTO dispute settlement. While a series of panels disagreed with the Appellate Body, there came a time—as one would predict—when further dialogue came to be viewed as futile because the discussion had run its course, and thus the panel in *US—Continued Zeroing* decided to follow the Appellate Body's precedents (notwithstanding its stated support for the reasoning of the previous “dissenting” panels). The cycle has thus reached a conclusion. Panels have reverted to following the Appellate Body, even without the Appellate Body forcing them to do so by forbidding them to depart from Appellate Body precedent. The Appellate Body, in exercising this restraint, has done far more for its legitimacy than it could ever hope to do by prohibiting opposition.

